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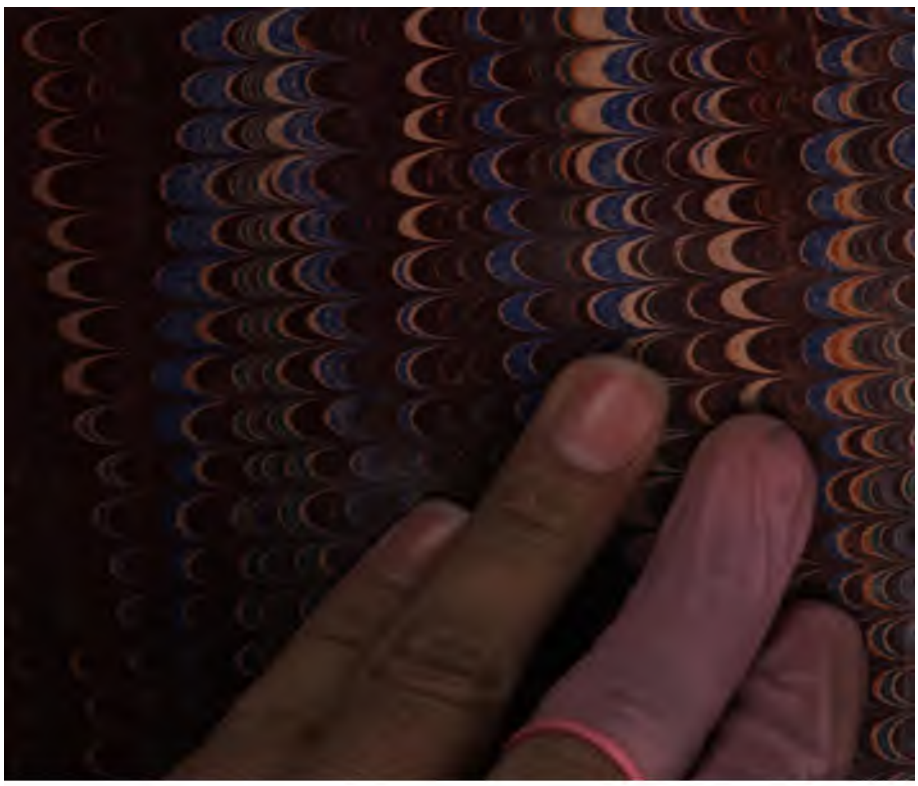
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ELEMENTS OF HISTORICAL AND PRACTICAL POLITICS.

A SKETCH OF INSTITUTIONAL HISTORY AND ADMINISTRATION.

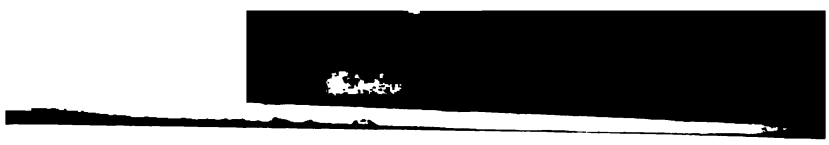
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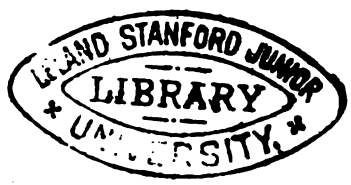
WOODROW WILSON, PH.D., LL.D.

AUTHOR OF "CONGRESSIONAL GOVERNMENT."

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TO

His Wife,

Whose Affectionate Sympathy
And Appreciative Interest
Have so Greatly Lightened the Labor
Of Preparing

This Work,

It is Gratefully Dedicated
by
THE AUTHOR.



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PREFACE.

THE scope and plan of this volume I need not explain; they are, I trust, self-evident; but a word or two of comment and suggestion I would fain address to those who may use the book in class instruction. In preparing it I labored under the disadvantage of having had no predecessors. So far as I have been able to ascertain, no text-book of like scope and purpose has hitherto been attempted. I was obliged, therefore, to put a great deal into this volume that I might have omitted had there been other compact and easily accessible statements of the details of modern governmental machinery. Had there been other books to which the student might easily resort for additional information, I should have confined myself much more than I have felt at liberty to do to the discussion of general principles and the elaboration of parallels or contrasts between different systems. As it was, I saw no way of doing adequately the work I had planned without putting in a great deal of detail.

The book, as a consequence, is very large. Realizing this, I have put a great deal of matter, containing minor details and most of my illustrations and parallels, into small print, in order that any part of such matter that the teacher saw fit to omit in class work might be omitted without breaking the continuity of the text. At the same time, the small print paragraphs are integral parts of the text, not separated from it as foot-notes would be, but running along with it as continuously as if they were in no way distinguished from the main body of it.

In the historical portions I have been greatly straitened for space and must depend upon the active and intelligent assist-

ance of the teacher. Picking out governmental facts, as I have done, from the body of political history, and taking for granted on the part of the reader a knowledge of the full historical setting of the facts I have used, I have, of course, been conscious of relying upon the teacher who uses the volume to make that assumption good as regards his own pupils. Large as the book is, it will require much supplement in the using. I trust that it will on that account prove sufficiently stimulating to both pupil and teacher to make good its claim to be the right sort of a text-book.

In hoping that the book will be acceptable to teachers at the present time I have relied upon that interest in comparative politics which has been so much stimulated in the English-speaking world in very recent years. I have meant that it should be in time to enter the doors of instruction now in all directions being opened wider and wider in American colleges to a thorough study of political science. I believe that our own institutions can be understood and appreciated only by those who know somewhat familiarly other systems of government and the main facts of general institutional history. By the use of a thorough comparative and historical method, moreover, a general clarification of views may be obtained. For one thing, the wide correspondences of organization and method in government — a unity in structure and procedure much greater than the uninitiated student of institutions is at all prepared to find — will appear, to the upsetting of many pet theories as to the special excellences of some one government. Such correspondences having been noted, it will be the easier to trace the differences which disclose themselves to their true sources in history and national character. The differences are in many instances nation-marks; the correspondences speak often of common experiences bringing common lessons, often of universal rules of convenience, sometimes of imitation. Certainly it does not now have to be argued that the only thorough method of study in politics is the comparative and

historical. I need not explain or justify the purpose of this volume, therefore: I need only ask indulgence for its faults of execution.

The work upon which I have chiefly relied in describing modern governments is the great *Handbuch des Oeffentlichen Rechts der Gegenwart* now being edited by Professor Heinrich Marquardsen of the University of Erlangen. This invaluable collection of monographs on the public law of modern states has been appearing in parts since 1883 and is now nearing completion. In most cases it embodied the latest authoritative expositions of my subjects accessible to me, and I have used it constantly in my preparation of this work. Without its assistance, what has been the labor of three years might have required twice as much time in the doing.

My chapter on the government of the United States was written before the appearance of Mr. Bryce's great work, *The American Commonwealth*. Only in one or two minor points, therefore, have I been able to make use of his invaluable commentary.

To some of my friends I am under special obligations, of which I gladly make grateful acknowledgment, for that most self-sacrificing of services, the critical reading of portions of my manuscript. This kindness was extended to me by Professor Herbert B. Adams and Mr. J. M. Vincent of Johns Hopkins University, Professor J. F. Jameson of Brown University, and Professor Munroe Smith of Columbia College. To these gentlemen I make my public acknowledgments, together with my public condolences, for their connection with this work. I am sure that they are responsible for none of its inaccuracies and for many of its excellences.

WOODROW WILSON.

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I.

THE PROBABLE ORIGIN OF GOVERNMENT.

1. **Nature of the Question.** — The probable origin of government is a question of fact, to be settled, not by conjecture, but by history. Its answer is to be sought amidst such traces as remain to us of the history of primitive societies. Facts have come down to us from that early time in fragments, many of them having been revealed only by inference, and having been built together by the sagacious ingenuity of scholars much as complete skeletons have been reared by inspired naturalists in the light of the meagre suggestions of only a fossil joint or two. As those fragments of primitive animals have been kept for us sealed up in the earth's rocks, so fragments of primitive institutions have been preserved, embedded in the rocks of surviving law or custom, mixed up with the rubbish of accumulated tradition, crystallized in the organization of still savage tribes, or kept curiously in the museum of fact and rumor swept together by some ancient historian. Limited and perplexing as such means of reconstructing history may be, they repay patient comparison and analysis as richly as do the materials of the archæologist and the philologian. The facts as to the origin and early history of government are at least as available as the facts concerning the growth and kinship of languages or the genesis and development of the arts and sciences. At any rate, such light as we can get from the knowledge of the infancy of society thus meagrely afforded us is better than that which might be derived from any *a priori*

speculations founded upon our acquaintance with our modern selves, or from any fancies, how learnedly soever constructed, that we could weave as to the way in which history might plausibly be read backwards.

2. **Races to be studied: the Aryans.** — For purposes of widest comparison in tracing the development of government it would of course be desirable to include in a study of early society not only those Aryan and Semitic races which have played the chief parts in the history of the world, but also every primitive tribe, whether Hottentot or Iroquois, Finn or Turk, of whose institutions and development we know anything at all. Such a world-wide survey would be necessary to any induction which should claim to trace government in all its forms to a common archetype. But, practically, no such sweeping together of incongruous savage usage and tradition is needed to construct a safe text from which to study the governments that have grown and come to full flower in the political world to which we belong. In order to trace the lineage of the European and American governments which have constituted the order of social life for those stronger and nobler races which have made the most notable progress in civilization, it is essential to know the political history of the Greeks, the Latins, the Teutons, and the Celts principally, if not only, and the original political habits and ideas of the Aryan and Semitic races alone. The existing governments of Europe and America furnish the dominating types of to-day. To know other systems that are defeated or dead would aid only indirectly towards an understanding of those which are alive and triumphant, as the survived fittest.

3. **Semitic and Turanian Instance.** — Even Semitic institutions, indeed, must occupy only a secondary place in such inquiries. The main stocks of modern European forms of government are Aryan. The institutional history of Semitic or Turanian peoples is not so much part of the history of those governments as analogous to it in many of the earlier stages

of development. Aryan, Semitic, and Turanian races alike seem to have passed at one period or another through similar forms of social organization. Each, consequently, furnishes illustrations in its history, and in those social customs and combinations which have most successfully survived the wreck of change, of probable early forms and possible successive stages of political life among the others. Aryan practice may often be freed from doubt by Semitic or Turanian instance; but it is Aryan practice we principally wish to know.

4. **Government rested First upon Kinship.** — What is known of the central nations of history clearly reveals the fact that social organization, and consequently government (which is the visible form of social organization), originated in *kinship*. The original bond of union and the original sanction for magisterial authority were one and the same thing, namely, real or feigned blood relationship. In other words, families were the primitive states. The original State was a Family. Historically the State of to-day may be regarded as in an important sense only an enlarged Family: 'State' is 'Family' writ large.

5. **Early History of the Family; was it originally Patriarchal?** — The origin of government is, therefore, intimately connected with the early history of the family. But the conclusions to be drawn from what is known of the beginnings of the family unfortunately furnish matter for much modern difference of opinion. This difference of opinion may be definitely summed up in the two following contrasted views: —

(1) That the *patriarchal* family, to which the early history of the greater races runs back, and with which that history seems to begin, was the family in its original estate, — the original, the true archaic family.

> The patriarchal family is that in which descent is traced to a common male ancestor, through a direct male line, and in which the authority of rule vests in the eldest living male ascendant.

(2) That the patriarchal family, which is acknowledged to be found in one stage or another of the development of almost every race, was a developed and comparatively late form of the family, and not its first form, having been evolved through various stages and varieties of polyandry (plurality of husbands) and of polygamy (plurality of wives) out of a possibly original state of promiscuity and utter confusion in the relations of the sexes and of consequent confusion in blood-relationship and in the government of offspring.

In brief, it is held on the one hand that the patriarchal family was the original family; and on the other, that it was not the original but a derived form, others of a less distinct organization preceding it.

6. **The Evidence: India.** — As has been intimated, the evidence upon which the first-named view is based is drawn chiefly from the history of what I have called the central races of the world, — those Aryan races, namely, which now dominate the continents of Europe and America, and which, besides fringing Africa with their intrusive settlements, have long since returned upon the East and reconquered much of their original home territory in Asia. In India the English have begun of late years to realize more fully than before that they are in the midst of fellow-Aryans whose stayed civilization and long-crystallized institutions have kept them back very near to their earliest social habits. In the caste system of India much of the most ancient law of the race, many of its most rudimentary conceptions of social relationships, have stuck fast, caught in a crust of immemorial observance. Many of the corners of India, besides, contain rude village-communities whose isolation, weakness, or inertia have delayed them still nearer the starting-point of social life. Among these belated Aryans all the plainer signs point to the patriarchal family as the family of their origin.

7. **Slavonic Communities, Ancient Irish Law, and Old Teutonic Customs.** — In Russia, in Dalmatia, and in Croatia

there still survive Slavonic village-communities of a very primitive type which give equally unequivocal testimony of the patriarchal organization as the original order of their social life. Ancient Irish law says the same thing of the archaic forms of social organization among the Aryan Celts: that the patriarchal family was the first political unit of the race. And to these the antique Teutonic community, still to be seen through all the changes of history in England and on the continent, adds the testimony of many customs of land tenure and of communal solidarity founded upon a clear tradition of kinship derived from a common ancestor.

8. **Greek and Roman Families.** — Besides these comparatively modern evidences of survived law and custom, we have, as clearer evidence still, the undoubted social beginnings of Greek and Roman politics. They too originated, if history is to be taken at its most plainly written word, in the patriarchal family. Roman law, that prolific mother of modern legal idea and practice, has this descent from the time when the father of the family ruled as the king and high priest of his little state impressed upon every feature of it. Greek institutions speak hardly less distinctly of a similar descent. These great classic Aryan stocks, at any rate, cannot be conclusively shown to have known any earlier form of social practice than that of the patriarchal family.

9. **A Doubt.** — Still, even Aryan institutions bear some obscure traces — traces of a possible early confusion in blood-relationships — which suggest a polity not patriarchal; and those who regard the patriarchal family as a comparatively late development point to these traces with the suggestion that they are possibly significant of the universal applicability of their own view as to the archaic types of society. Even where such traces are most distinct, however, in legend and custom, they are by no means so distinct as to necessitate a doubt as to the substantial correctness of the patriarchal theory. They are all susceptible of explanations which would sustain, or at least not impair, that theory.

10. **The Non-Aryan Family.** — All the really substantial evidence of the absence from early society of anything like definite forms of the family, based upon clear kinship such as is presupposed in the patriarchal theory, is drawn from what, from our present point of view, we may call the outlying races, — the non-Aryan races. Many of these races have remained stationary, evidently for centuries, in what, comparing their condition with our own, we call a savage state, in which there is good reason to believe that very early systems of social order have been perpetuated. In such cases evidences abound of the reckoning of kinship through mothers only, as if in matter-of-course doubt as to paternity; of consanguinity signified throughout the wide circle of a tribe, not by real or supposed common descent from a human ancestor, but by means of the fiction of common descent from some bird or beast, from which the tribe takes its name, as if for lack of any better means of determining common blood; of marriages of brothers with sisters, and of groups of men with groups of women, or of groups of men with some one woman. In the case of some of these tribes, moreover, among whom polygamy or even monogamy now exists, together with a patriarchal discipline, it is thought to be possible to trace clear indications of an evolution of these more civilized forms of family organization from earlier practices of loose multiple marriages or even still earlier promiscuity in the sexual relation.

It is thus that color of probability is given to the view that the patriarchal family, in these cases almost certainly, has in all cases possibly been developed from such originals.

11. **Aryan Tradition.** — These proofs, however, reach the Aryan races only by doubtful inference, through rare and obscure signs. No belief is more deeply fixed in the traditions of these stronger races than the belief of direct common descent, through males, from a common male ancestor, human or divine; and nothing could be more numerous or distinct than the traces inhering in the very heart of their polity of an

original patriarchal organization of the family as the archetype of their political order.

12. **From the Patriarchal Family to the State.** — The patriarchal family being taken, then, as the original political unit of these races, we have a sufficiently clear picture of the infancy of government. First there is the family ruled by the father as king and priest. There is no majority for the sons so long as their father lives. They may marry and have children, but they can have no entirely separate and independent authority during their father's life save such as he suffers them to exercise. All that they possess, their lives even and the lives of those dependent upon them, are at the disposal of this absolute father-sovereign. The family broadens in time into the 'House,' the *gens*, and over this too the chiefest kinsman rules. There are common religious rites and observances which the *gens* regards as symbolic of its unity as a composite family; and heads of houses exercise high representative and probably certain imperative magisterial functions by virtue of their position. Houses at length unite into tribes; and the chieftain is still hedged about by the sanctity of common kinship with the tribesmen whom he rules. He is, in theory at least, the chief kinsman, the kinsman in authority. Finally, tribes unite, and the ancient state emerges, with its king, the father and priest of his people.

13. **Prepossessions to be put away.** — In looking back to these first stages of political development, it is necessary to put away from the mind certain prepossessions which are both proper and legitimate to modern conceptions of government, but which could have found no place in primitive thought on the subject. It is not possible nowadays to understand the early history of institutions without thus first divesting the mind of many conceptions most natural and apparently most necessary to it. The centuries which separate us from the infancy of society separate us also, by the whole length of the history of human thought, from the ideas into which the

fathers of the race were born; and nothing but a most credulous movement of the imagination can enable the student of to-day to throw himself back into those conceptions of social connection and authority in which government took its rise.

14. **The State and the Land.** — How is it possible, for instance, for the modern mind to conceive distinctly a *travelling* political organization, a state without territorial boundaries or the need of them, composed of persons, but associated with no fixed or certain habitat? And yet such were the early states, — nomadic groups, now and again hunting, fishing, or tending their herds by this or that particular river or upon this or that familiar mountain slope or inland seashore, but never regarding themselves or regarded by their neighbors as finally identified with any definite territory. Historians have pointed out the abundant evidences of these facts that are to be found in the history of Europe no further back than the fifth century of our own era. The Franks came pouring into the Roman empire just because they had had no idea theretofore of being confined to any particular Frank-*land*. They left no France behind them at the sources of the Rhine; and their kings quitted those earlier seats of their race, not as kings of France, but as kings of the Franks. There were kings of the Franks when the territory now called Germany, as well as that now known as France, was in the possession of that imperious race: and they became kings of France only when, some centuries later, they had settled down to the unaccustomed habit of confining themselves to a single land. Drawn by the processes of feudalization (secs. 243, 253, 268, 269), sovereignty then found at last a local habitation and a new name.

15. The same was true of the other Germanic nations. They also had chiefs who were *their* chiefs, not the chiefs of their lands. There were kings of the English for many a year, even for several centuries after A.D. 449, before there was such a thing as a king of England. John, indeed, was the first officially to assume the latter title. From the first, it is true,

social organization has everywhere tended to connect itself more and more intimately with the land from which each social group has drawn its sustenance. When the migratory life was over, especially, and the settled occupations of agriculture had brought men to a stand upon the land which they were learning to till, political life, like all the other communal activities, came to be associated more and more directly with the land on which each community lived. But such a connection between lordship and land was a slowly developed notion, not a notion twin-born with the notion of government.

16. Modern definitions of a state always limit sovereignty to some definite land. "The State," says Bluntschli, "is the politically organized people (*Volkperson*) *of a particular land*"; and all other authoritative writers similarly set distinct physical boundaries to the state. Such an idea would not have been intelligible to the first builders of government. They could not have understood why they might not move their whole people, 'bag and baggage,' to other lands, or why, for the matter of that, they might not keep them moving their tents and possessions unrestingly from place to place in perpetual migration, without in the least disturbing the integrity or even the administration of their infant 'State.' Each organized group of men had other means of knowing their unity than mere neighborhood to one another; other means of distinguishing themselves from similar groups of men than distance or the intervention of mountain or stream. The original governments were knit together by bonds closer than those of geography, more real than the bonds of mere contiguity. They were bound together by real or assumed kinship. They had a corporate existence which they regarded as inhering in their blood and as expressed in all their daily relations with each other. They lived together because of these relations; they were not related because they lived together.

17. **Contract versus Status.** — Scarcely less necessary to modern thought than the idea of territoriality as connected

with the existence of a state, is the idea of contract as determining the relations of individuals. And yet this idea, too, must be put away if we would understand primitive society. In that society men were *born* into the station and the part they were to have throughout life, as they still are among the peoples who preserve their earliest conceptions of social order. This is known as the law of *status*. It is not a matter of choice or of voluntary arrangement in what relations men shall stand towards each other as individuals. He who is born a slave, let him remain a slave; the artisan, an artisan; the priest, a priest, — is the command of the law of status. Excellency cannot avail to raise any man above his parentage; aptitude may operate only within the sphere of each man's birth-right. No man may lose 'caste' without losing respectability also and forfeiting the protection of the law. Or, to go back to a less developed society, no son, however gifted, may lawfully break away from the authority of his father, however cruel or incapable that father may be; or make any alliance which will in the least degree draw him away from the family alliance and duty into which he was born. There is no thought of contract. Every man's career is determined for him before his birth. His blood makes his life. To break away from one's birth station, under such a system, is to make breach not only of social, but also of religious duty, and to bring upon oneself the curses of men and gods. Primitive society rested, not upon contract, but upon status. Status had to be broken through by some conscious or unconscious revolution before so much as the idea of contract could arise; and when that idea did arise, change and variety were assured. Change of the existing social order was the last thing of which the primitive state dreamed; and those races which allowed the rule of status to harden about their lives still stand where they stood a thousand years ago. "The leaving of men to have their careers determined by their efficiencies," says Mr. Spencer, "we may call the principle of change in social organization."

18. **Theories concerning the Origin of the State: the Contract Theory.** — Such views of primitive society furnish us with destructive dissolvents of certain theories once of almost universal vogue as to the origin of government. The most famous, and for our present purposes most important, of these theories is that which ascribes the origin of government to a 'social compact' among primitive men.

The most notable names connected with this theory as used to account for the existence of political society are the names of Hooker, Hobbes, Locke, and Rousseau. It is to be found developed in Hooker's *Ecclesiastical Polity*, Hobbes' *Leviathan*, Locke's *Civil Government*, and Rousseau's *The Social Contract*.

This theory begins always with the assumption that there exists, outside of and above the laws of men, a Law of Nature.[1] Hobbes conceived this Law to include "justice," "equity," "modesty," "mercy"; "in sum, 'doing to others as we would be done to.'" All its chief commentators considered it the abstract standard to which human law should conform. Into this Law primitive men were born. It was binding upon their individual consciences; but those consciences were overwhelmed by individual pride, ambition, desire, and passion, which were strong enough to abrogate Nature's Law. That Law, besides, did not bind men *together*. Its dictates, if obeyed, would indeed enable them to live tolerably with one another; but its dictates were not obeyed; and, even if they had been, would have furnished no permanent frame of civil government, inasmuch as it did not sanction magistracies, the setting of some men to be judges of the duty and conduct of other men, but left each conscience to command absolutely its possessor. In the language of the 'judicious Hooker,' the laws of Nature "do bind men absolutely, even as they are men, although they have never any settled fellowship, never any solemn agreement,

[1] For the natural history of this conception of a Law of Nature, see Maine, *Ancient Law*, Chap. III. Also *post*, secs. 208, 209.

amongst themselves what to do or not to do; but forasmuch as we are not by ourselves sufficient to furnish ourselves with competent store of things needful for such a life as our Nature doth desire, a life fit for the dignity of man, therefore to supply these defects and imperfections which are in us living single and solely by ourselves, we are naturally induced to seek communion and fellowship with others. This was the cause of men uniting themselves at first in politic societies."[1] In other words, the belligerent, non-social parts of man's nature were originally too strong for this Law of Nature, and the 'state of nature,' in which that Law, and only that Law, offered restraint to the selfish passions, became practically a *state of war*, and consequently intolerable. It was brought to an end in the only way in which such a condition of affairs could be brought to an end without mutual extermination, namely, by common consent, by men's "agreeing together mutually to enter into one community and make one body politic." (Locke.) This agreement meant submission to some one common authority, which should judge between man and man; the surrender on the part of each man of all rights antagonistic to the rights of others; forbearance and co-operation. Locke confidently affirmed "that all men are naturally in that state [a state, *i.e.*, of nature], and remain so till, by their own consents, they make themselves members of some politic society." It was only as the result of deliberate choice, in the presence of the possible alternative of continuing in this state of nature, that commonwealths, *i.e.*, regularly constituted governments, came into being.

19. **Traditions of an Original Law-giver.** — Ancient tradition had another way of accounting for the origin of laws and institutions. The thought of almost every nation of antiquity went back to some single law-giver in whose hands their government had taken its essential and characteristic

[1] *Ecclesiastical Polity*, Book I., sec. 10.

form, if not its beginning. There was a Moses in the background of many a history besides that of the Jews. In the East there was Menu; Crete had her Minos; Athens her Solon; Sparta her Lycurgus; Rome her Numa; England her Alfred. These names do not indeed in every instance stand so far back as the beginning of all government; but they do carry the mind back in almost every case to the birth of *national* systems, and suggest the overshadowing influence of individual statesmen as the creative power in framing the greater combinations of politics. They bring the conception of conscious choice into the history of institutions. They look upon systems as *made*, rather than as developed.

20. **Theory of the Divine Origin of the State.** — Not altogether unlike these ancient conceptions of law-givers towering above other men in wisdom and authority, dominating political construction, and possibly inspired by divine suggestion, is that more modern idea which attributes human government to the immediate institution of God himself, — to the direct mandate of the Creator. This theory has taken either the definite form of regarding human rulers as the direct vicegerents of God, or the vague form of regarding government as in some way given man as part of his original make-up.

21. **The Theories and the Facts.** — Modern research into the early history of mankind has made it possible to reconstruct, in outline, much of the thought and practice of primitive society, and has thus revealed facts which render it impossible for us to accept any of these views as adequately explaining what they pretend to explain. The defects of the social compact theory are too plain to need more than brief mention. That theory simply has no historical foundation. *Status* was the basis of primitive society: the individual counted for nothing; society — the family, the tribe — counted for everything. Government came, so to say, before the individual. There was, consequently, no place for contract, and yet this theory makes contract the first fact of social

life. Such a contract as it imagines could not have stood unless supported by that reverence for 'law' which is an altogether modern principle of action. The times in which government originated knew absolutely nothing of law as we conceive law. The only bond was kinship, — the common blood of the community; the only individuality was the individuality of the community as a whole. Man was merged in society. Without kinship there was no duty and no union. It was not by compounding rights, but by assuming kinship, that groups widened into states — not by contract, but by adoption. Not deliberate and reasoned respect for law, but habitual and instinctive respect for authority, held men together; and authority did not rest upon mutual agreement, but upon mutual subordination.

22. Of the theories of the origination of government in individual law-giving or in divine dictate, it is sufficient to say that the one exaggerates the part played by human choice, and the other the part played by man's implanted instincts, in the formation and shaping of political society.

23. **The Truth in the Theories.** — Upon each of these theories, nevertheless, there evidently lies the shadow of a truth. Although government did not originate in a deliberate contract, and although no system of law or of social order was ever made 'out of hand' by any one man, government was not all a mere spontaneous growth. Deliberate choice has always played a part in its development. It was not, on the one hand, given to man ready-made by God, nor was it, on the other hand, a human contrivance. In its origin it was spontaneous, natural, twin-born with man and the family; Aristotle was simply stating a fact when he said, "Man is by nature a political animal." But, once having arisen, government was affected, and profoundly affected, by man's choice; only that choice entered, not to originate, but to modify government.

24. **Conclusion.** — Viewed in the light of "the observed and recorded experience of mankind," "the ground and origin of

society is not a compact; that never existed in any known case, and never was a condition of obligation either in primitive or developed societies, either between subjects and sovereign, or between the equal members of a sovereign body. The true ground is the acceptance of conditions which came into existence by the sociability inherent in man, and were developed by man's spontaneous search after convenience. The statement that while the constitution of man is the work of nature, that of the state is the work of art, is as misleading as the opposite statement that governments are not made, but grow. The truth lies between them, in such propositions as that institutions owe their existence and development to deliberate human effort, working in accordance with circumstances naturally fixed both in human character and in the external field of its activity." [1]

Some Representative Authorities.

Maine, Sir H. S., "Ancient Law," and "Early Law and Custom," especially Chap. VII.
Lubbock, Sir Jno., "Prehistoric Times," and "Origin of Civilization."
Spencer, H., "Principles of Sociology," Vol. I., Part III.
Hearn, Wm. E., "The Aryan Household."
Fustel de *Coulanges*, "The Ancient City."
Lyall, Sir A. C., "Asiatic Studies."

With more especial reference to the early history of the family than the above, and opposed to the views of Maine, Spencer, and others which I have embodied in my text:

Morgan, L. H., "Ancient Society."
McLennan, J. F., "Studies in Ancient History," and "The Patriarchal Theory" (edited by Donald McLennan).

[1] John Morley, *Rousseau*, Vol. II., pp. 183–4.



Smith, W. Robertson, "Kinship and Marriage in Early Arabia."
Lang, A. Article 'Family' in the Encyclopædia Britannica, and article 'Early History of the Family,' *Contemporary Rev.*, Sept., 1883.

With reference to the contract theory of the origin of government:

Hooker, "Ecclesiastical Polity."
Hobbes, "Leviathan."
Locke, Jno., "Essays on Civil Government."
Rousseau, J. J., "The Social Contract."

II.

THE PROBABLE EARLY DEVELOPMENT OF GOVERNMENT.

25. **The Beginnings of Government.** — Government must have had substantially the same early history amongst all progressive races. It must have begun in clearly defined family discipline. Such discipline would scarcely be possible among races in which consanguinity was subject to profound confusion and in which family discipline therefore had no clear basis of authority on which to rest. In every case, it would seem, the origination of what we would deem government must have awaited the development of some such definite family as that in which the father was known, and known as ruler. Whether or not, therefore, the patriarchal family was the first form of the family, it must have furnished the first adequate form of government.

26. **The Family the Primal Unit.** — The family, then, was the primal unit of political society, and the seed-bed of all larger growths of government. The individuals that were drawn together to constitute the earliest communities were not individual men, as Locke and Locke's co-theorists would lead us to believe, but individual families, and the organization of these families, whether singly or in groups, furnished the ideas in which political society took its root. We have already seen what the nature of that organization was. The members of each family were bound together by kinship. The father's authority bore the single sanction of his being the

fountain-head of the common blood-relationship. No other bond was known, or was then conceivable, but this single bond of kinship. A man out of the circle of kinship was outside the boundaries of possible friendship, was as of course an alien and an enemy.

27. **Persistence of the Idea of Kinship.** — When society grew, it grew without any change of this idea. Kinship was still, actually or theoretically, its only amalgam. The commonwealth was conceived of as being only a larger kindred. When by natural increase a family multiplied its branches and widened into a *gens*, and there was no grandfather, great-grandfather, or other patriarch living to keep it together in actual domestic oneness, it would still not separate. The extinct authority of the actual ancestor could be replaced by the less comprehensive but little less revered authority of some selected elder of the 'house,' the oldest living ascendant, or the most capable. Here would be the materials for a complete body politic held together by the old fibre of actual kinship.

28. **Fictitious Kinship: Adoption.** — Organization upon the basis of a fictitious kinship was hardly less naturally contrived in primitive society. There was the ready, and immemorial, fiction of *adoption*, which to the thought of that time seemed scarcely a fiction at all. The adopted man was no less real a member of the family than was he who was natural-born. His admittance to the sacred, the exclusive religious mysteries of the family, at which no stranger was ever suffered even to be present, and his acceptance of the family gods as his own gods, was not less efficacious in making him one with the household and the kin than if he had opened his veins to receive their blood. And so, too, houses could grow by the adoption of families, through the grafting of the alien branches into this same sacred stock of the esoteric religion of the kindred. Whether naturally, therefore, or thus artificially, houses widened into tribes, and tribes into commonwealths without loss of that kinship in the absence of

which, to the thinking of early men, there could be no communion, and therefore no community, at all.

29. **Kinship and Religion.** — In this development kinship and religion operated as the two chief formative influences. Religion seems in most instances to have been at first only the expression of kinship. The central and most sacred worship of each group of men, whether family or tribe, was the worship of *ancestors*. At the family or communal altar the worshipper came into the presence of the shades of the great dead of his family or race. To them he did homage; from them he craved protection and guidance. The adopted man, therefore, received into this hallowed communion with the gods of the family, was accepting its fathers as his own, was taking upon himself the most solemn duties and acquiring the most sacred privileges of kinship. So, too, of the family adopted into the *gens*, or the *gens* received into the tribe. The new group accepted the ancestry by accepting the worship of the adopting house or community.

Religion was thus quite inseparably linked with kinship. It may be said to have been the thought of which kinship was the embodiment. It was the sign and seal of the common blood, the expression of its oneness, its sanctity, its obligations. He who had entered into the bonds of this religion had, therefore, entered into the heart of kinship and taken of its life-blood. His blood-relationship was thus rendered no fiction at all to the thought of that day, but a solemn verity, to which every religious ceremonial bore impressive witness.

30. **The Bonds of Religion and Precedent.** — The results of such a system of life and thought were most momentous. It is commonplace now to remark upon English regard for precedent, and upon the interesting development of 'common' and 'case' law. But not even an Englishman or an American can easily conceive of any such reverential regard for precedent as must have resulted from a canonization of ancestors. We have ourselves in a measure canonized our

own forefathers of the revolutionary era, worshipping them around fourth of July altars, to the great benefit both of our patriotism and of our political morality. But the men of '76, we are all willing to acknowledge, were at their greatest only men. The ancestor of the primitive man became, on the contrary, a god, and a god of undying power. His spirit lived on to bless or to curse. His favor had to be propitiated, his anger appeased. And herein was a terribly effective sanction for precedent. It was no light matter to depart from the practices of these potent ancestors. To do so was to run in the face of the deities. It was to outrage all religious feeling, to break away from all the duties of spiritual kinship. Precedent was under such circumstances imperative. Precedent of course soon aggregated into custom, — such custom as it is now scarcely possible to conceive of, — a supreme, uniform, imperious, infrangible rule of life which brought within its inexorable commands every detail of daily conduct.

31. **The Reign of Custom.** — This reign of customary law was long and decisive. Its tendency was to stiffen social life into a formula. It left almost no room at all for the play of individuality. The family was a despotism, society a routine. There was for each man a rigorous drill of conformity to the custom of his tribe and house. Superstition strengthened every cord and knot of the net-work of observance which bound men to the practices of their fathers and their neighbors. That tyranny of social convention which men of independent or erratic impulse nowadays find so irksome — that 'tyranny of one's next door neighbor' against which there are now and again found men bold enough to rebel — had its ideal archetype in this rigid uniformity of custom which held ancient society in hard crystallization.

32. **Fixity of System the Rule, Change the Exception.** — Such was the discipline that moulded the infancy of political society: within the family, the supreme will of the father; outside the family, the changeless standards of public opinion.

The tendency, of course, was for custom to become fixed in a crust too solid ever to be broken through. In the majority of cases, indeed, this tendency was fulfilled. Many races have never come out of this tutelage of inexorable custom. Many others have advanced only so far beyond it as those caste systems in which the law of *status* and the supremacy of immemorial custom have worked out their logical result in an unchanging balance of hereditary classes. The majority of mankind have remained stationary in one or another of the earliest stages of political development, their laws now constituting as it were ancient records out of which the learned may rewrite the early history of those other races whom primitive custom did not stagnate, but whose systems both of government and of thought still retain many traces (illegible without illumination from the facts of modern savage life) of a similar infancy. Stagnation has been the rule, progress the exception. The greater part of the world illustrates in its laws and institutions what the rest of the world has escaped; this rest of the world illustrates what favorable change was capable of making out of the primitive practices with which the greater part of the world has remained *per force* content.

33. **Changes of System outrun Changes of Idea.** — The original likeness of the progressive races to those which have stood still is witnessed by that persistency of idea of which I have already spoken. Progress has brought nations out of the primitive practices vastly more rapidly than it has brought them out of the primitive ideas of political society. Practical reform has now and again attained a speed that has never been possible to thought. Instances of this truth so abound in the daily history of the most progressive nations of the world of to-day that it ought not to be difficult for us to realize its validity in the world of the first days of society. Our own guilds and unions and orders, merely voluntary and conventional organizations as they are, retain in their still vivid sense of the *brotherhood* of their members at least a reminiscence of

the ideas of that early time when kinship was the only conceivable basis of association between man and man, when "each assemblage of men seems to have been conceived as a Family."[1] In England political change has made the great strides of the last two centuries without making the Crown any less the central object of the theoretical or lawyerly conception of the English constitution. Every day witnesses important extensions and even alterations of the law in our courts under the semblance of a simple application of old rules (secs. 201, 1187, 1188). Circumstances alter principles as well as cases; but it is only the cases which are supposed to be altered. The principles remain, in form, the same. Men still carry their brides on wedding journeys, although the necessity for doing so ceased with the practice, once universal, of stealing a bride. 'Good blood' still continues to work wonders, though achievement has come to be the only real patent of nobility in the modern world. In a thousand ways we are more advanced than we *think* we are.

34. **How did Change enter?** — The great question, then, is, How did change enter at all that great nursery of custom in which all nations once wore short clothes, and in which so many nations still occupy themselves with the superstitions and the small play of childhood? How did it come about that some men became progressive, while most did not? This is a question by no means easy to answer, but there are probabilities which may throw some light upon it.

35. **Differences of Custom.** — In the first place, it is not probable that all the groups of men in that early time had the same customs. Custom was doubtless as flexible and malleable in its infancy as it was inflexible and changeless in its old age. In proportion as group separated from group in the restless days of the nomadic life, custom would become differentiated from custom. Then, after first being the cause, isolation

[1] Maine, *Early History of Institutions*, p. 232.

would become the natural result of differences of life and belief. A family or tribe which had taken itself apart and built up a practice and opinion peculiar to itself would thereby have made itself irrevocably a stranger to its one-time kinsmen of other tribes. When its life did touch their life, it would touch to clash, and not to harmonize or unite. There would be a Trojan war. The Greeks had themselves come from these very Ægean coasts of Asia Minor, and these Trojans were doubtless their forgotten and now alien kinsmen. Greeks, Romans, Celts, had probably once been a single people; but how unlike did they become!

36. **Antagonism between Customs.** — We need not specially spur our imaginations to realize how repugnant, how naturally antagonistic, to each other families or tribes or races would be rendered by differences of custom. "We all know that there is nothing that human beings (especially when in a low state of culture) are so little disposed to tolerate as divergencies of custom," says Mr. Hamerton, who is so sure of the fact that he does not stop to illustrate it. How 'odd,' if not 'ridiculous,' the ways of life and the forms of belief often seem to us in a foreign country, — how instinctively we pronounce them inferior to our own! The Chinaman manages his rice much more skilfully with his 'chop-sticks' than we manage ours with our forks; and yet how 'queer,' how 'absurd' chop-sticks are! And so also in the weightier matters of social and religious practice.

37. **Competition of Customs.** — To the view of the primitive man all customs, great or small, were matters of religion. His whole life was an affair of religion. For every detail of conduct he was accountable to his gods and to the religious sentiment of his own people. To tolerate any practices different from those which were sanctioned by the immemorial usage of the tribe was to tolerate impiety. It was a matter of the deepest moment, therefore, with each tribal group to keep itself uncontaminated by alien custom, to stamp such custom out

wherever or whenever it could be discovered. That was a time of war, and war meant a competition of customs. The conqueror crushed out the practices of the conquered and compelled them into conformity with his own.

38. **The Better prevail.** — Of course in such a competition the better custom would prevail over the worse.[1] The patriarchal family, with its strict discipline of the young men of the tribe, would unquestionably be "the best campaigning family," — would supply the best internal organization for war. Hence, probably, the national aspect of the world to-day: peoples of patriarchal tradition occupying in unquestioned ascendency the choicest districts of the earth; all others thrust out into the heats or colds of the less-favored continents, or crowded into the forgotten corners and valley-closets of the world. So, too, with the more invigorating and sustaining religions. Those tribes which were least intimidated by petty phantoms of superstition, least hampered by the chains of empty but imperative religious ceremonial, by the engrossing observance of times and seasons, having greater confidence in their gods, would have greater confidence in themselves, would be freer to win fortune by their own hands, instead of passively seeking it in the signs of the heavens or in the aspects of nearer nature; and so would be the surer conquerors of the earth. Religion and the family organization were for these early groups of kindred men the two indexes of character. In them was contained inferiority or superiority. The most serviceable customs won the day.

39. **Isolation, Stagnation.** — Absolute isolation for any of these early groups would of course have meant stagnation; just as surely as contact with other groups meant war. The world, accordingly, abounds in stagnated nationalities; for it is full of instances of isolation. The great caste nations are examples. It is, of course, only by a figure of speech that we

[1] For the best development of the whole idea of this paragraph and others in this connection, see Bagehot, *Physics and Politics*, Chap. II.

can speak of vast peoples like those of China and India as isolated, though it is scarcely a figure of speech to say that they are stagnated. Still in a very real sense even these populous nations were isolated. We may say, from what we discern of the movements of the nations from their original seats in Asia, that the races of China and India were the 'back-water' from the great streams of migration. Those great streams turned towards Europe and left these outlying waters to subside at their leisure. In subsiding there was no little commotion amongst them. There were doubtless as many inter-tribal wars in the early history of China before the amalgamation of the vast kingdom as there have been in the history of India. That same competition of custom with custom which took place elsewhere, also took place there. But the tribes which pressed into China were probably from the first much of a kind, with differing but not too widely contrasted customs which made it possible for them to assume at a now very remote period a uniformity of religion and of social organization never known amongst the peoples that had gone to the West; so that, before the history that the rest of the world remembers had begun, China's wall had shut her in to a safe stagnation of monotonous uniformity. The great Indian castes were similarly set apart in their vast peninsula by the gigantic mountains which piled themselves between them and the rest of the continent. The later conquests which China and India suffered at the hands of Oriental invaders resulted in mere overlordships, which changed the destination of taxes, but did not touch the forms of local custom.

40. **Movement and Change in the West.** — It is easy to imagine a rapid death-rate, or at least an incessant transformation, amongst the customs of those races which migrated and competed in the West. There was not only the contact with each other which precipitated war and settled the question of predominance between custom and custom; there was also the slow but potent leaven of shifting scene and changing circum-

stance. The movement of the peoples was not the march of a host. It was only the slow progress of advancing races, its stages often centuries long, its delays fruitful of new habits and new aspirations. We have, doubtless, a type of what took place in those early days in the transformation of the Greeks after they had come down to the sea from the interior of Asia Minor. We can dimly see them beginning a new life there on those fertile coasts. Slowly they acquired familiarity with their new neighbor, the ocean. They learned its moods. They imagined new gods as breathing in its mild or storming in its tempestuous winds. They at length trusted themselves to its mercy in boats. The handling of boats made them sailors; and, lured from island to island across that inviting sea, they reached those later homes of their race with which their name was to be ever afterwards associated. And they reached this new country changed men, their hearts strengthened for bolder adventure, their hands quick with a readier skill, their minds open to greater enthusiasms and enriched with warmer imaginings, their whole nature profoundly affected by contact with Father Ægeus.

41. **Migration and Conquest.** — And so, to a greater or less extent, it must have been with other races in their movements towards their final seats. Not only the changes of circumstance and the exigencies of new conditions of life, but also the conquests necessarily incident to those days of migration, must have worked great, though slow, alterations in national character. We know the Latins to have been of the same stock with the Greeks; but by the time the Latins have reached Italy they are already radically different in habit, belief, and capacity from the Greeks, who have, by other routes, reached and settled Magna Græcia. Conquest changes not only the conquered, but also the conquerors. Insensibly, it may be, but deeply, they are affected by the character of the subdued or absorbed races. Norman does not merge with Saxon without getting Saxon blood into his own veins, and Saxon thoughts

into his head; neither had Saxon overcome Celt without being himself more or less taken captive by Celtic superstition. And these are but historical instances of what must have been more or less characteristic of similar events in 'prehistoric' times.

42. **Inter-tribal Imitation.** — There must, too, have been among the less successful or only partially successful races a powerful tendency towards *imitation* constantly at work, — imitation of the institutions of their more successful neighbors and rivals. Just as we see, in the histories of the Old Testament, frequent instances of peoples defeated by Jewish arms incontinently forsaking their own divinities and humbly commending themselves to the God of Israel, so must many another race, defeated or foiled in unrecorded wars, have forced themselves to learn the customs in order that they might equal the tactics of rival races.

43. **Individual Initiative and Imitation.** — And this impulse towards imitation, powerful as between group and group, would of course, in times of movement and conquest, be even more potent as amongst individual men. Such times would be rich with opportunity for those who had energy and enterprise. Many a great career could be carved out of the events of days of steady achievement. Men would, as pioneers in a new country or as leaders in war, be more or less freed from the narrow restrictions of hard and fast custom. They could be unconventional. Their individual gifts could have play. Each success would not only establish their right to be themselves, but would also raise up after them hosts of imitators. New types would find acceptance in the national life; and so a new leaven would be introduced. Individual initiative would at last be permitted a voice, even as against immemorial custom.

44. **Institutional Changes: Choice of Rulers.** — It is easy to see how, under the bracing influences of race competition, such forces of change would operate to initiate and hasten a progress towards the perfecting of institutions and the final

abolition of slavery to habit. And it is no less plain to see how such forces of change would affect the constitution of government. It is evident that, as has been said (sec. 38), the patriarchal family did furnish the best campaigning materials, and that those races whose primitive organization was of this type did rapidly come to possess the "most-competed-for" parts of the earth. They did come to be the chief, the central races of history. But race aggregations, through conquest or adoption, must have worked considerable changes in the political bearings of the patriarchal principle. The direct line of male descent from the reputed common progenitor of the race could hardly continue indefinitely to be observed in filling the chieftainship of the race. A distinct element of choice — of election — must have crept in at a very early period. The individual initiative of which I have spoken, contributed very powerfully to effect this change. The oldest male of the hitherto reigning family was no longer chosen as of course, but the wisest or the bravest. It was even open to the national choice to go upon occasion altogether outside this succession and choose a leader of force and resource from some other family.

45. **Hereditary replaced by Political Magistracy.** — Of course mere growth had much to do with these transformations. As tribes grew into nations, by all the processes of natural and artificial increase, all distinctness of mutual blood-relationship faded away. Direct common lines of descent became hopelessly obscured. Cross-kinships fell into inextricable confusion. Family government and race government became necessarily divorced, — differentiated. The state continued to be conceived as a Family; but the headship of this vast and complex family ceased to be natural and became *political*. So soon as hereditary title was broken in upon, the family no longer dominated the state; the state at last dominated the family. It often fell out that a son, absolutely subject to his father in the family, was by election made mas

ter of his father outside the family, in the state. Political had at least begun to grow away from domestic authority.

46. **Summary.** — It will be possible to set forth the nature of these changes more distinctly when discussing Greek and Roman institutions at length in the next chapter. Enough has been said here to make plain the approaches to those systems of government with which we are familiar in the modern world. We can understand how custom crystallized about the primitive man; how in the case of the majority of mankind it preserved itself against all essential change; how with the favored minority of the race it was broken by war, altered by imperative circumstance, modified by imitation, and infringed by individual initiative; how change resulted in progress; and how, at last, kinsmen became fellow-citizens.

Additional Authorities on Primitive Society.

Bagehot, Walter, "Physics and Politics; or, Thoughts on the Application of the Principles of Natural Selection and Inheritance to Political Society."

Spencer, Herbert, "Ceremonial Institutions," and "Political Institutions."

Tylor, E. G., "Early History of Mankind," and "Primitive Culture."

Maine, Sir H. S., "Early History of Institutions," and "Village Communities in the East and West."

III.

THE GOVERNMENTS OF GREECE AND ROME.

47. **The Evolution of Government.** — At no one of the various stages of their development may we photograph the ancient classical governments and say that we have an adequate picture of Greek or Roman political practice. We cannot speak of the governments of Greece and Rome instructively except as evolutions. Their history is of course never complete at any one period. Moreover, each stage of their development illuminates the processes which we have just been discussing, the processes by which the primitive constructions of government were modified and modern systems of government approached. We may study modern governments as they are; but in order to understand modern governments as they are it is necessary to know ancient and mediæval governments in all their successive periods of development.

(1) The Governments of Greece.

48. **The Patriarchal Presidencies: Legislation.** — We get our earliest glimpse of Greek governments from Homer. When the Iliad and Odyssey were written, monarchy was universal throughout the Greek world. But not such monarchy as grew up in the later times of classical political development with which we are more familiar. It was monarchy of a kind which no longer exists. It would be more in keeping with the modern meaning of words to describe it as a *Patriarchal Presidency*.

The kings of Homer's songs were not supreme rulers who gave law and singly administered justice to their subjects. They were chief nobles, 'the first among equals,' presidents of councils of peers. The early monarchies of Greece were not constituted of single cities, like the later republics, but probably of groups of communities acknowledging a common government. The centre of that government was the council of Elders (*Gerontes*), heads of the noble families. That council was the "king's council" only because it convened at the king's summons. He called his peers to a feast. To speak modernly, the dinner-table was the council-board. State affairs were discussed over the wine and the viands: after an informal manner which suggests to the reader of to-day Friedrich Wilhelm's "Tobacco Parliament," where imperial business shaped itself as it might through the laconic speech of king and councillors uttered amidst the dense smoke of busy fuming pipes. Here the purposes and plans of government originated. Prussian plans, however, were seldom formally announced: Greek plans were almost always made publicly known. The king summoned an assembly of the people (assemblies, that is, of the *gentes*, the members of the recognized immemorial kinship) to hear the decrees of the elders. The presidency of this assembly, like the presidency of the council, belonged to the king; or, rather, the council itself, as it were, presided, under the headship of the king. The elders sat, that is, before the assembled tribesmen about the person of the king. The king made known the business to be considered, and the elders, if they chose, addressed the people concerning it. No vote was taken. The assembly freely made known its sentiments concerning the utterances of the noble orators by noisy demonstrations of agreement or disagreement, and on critical occasions its feelings no doubt counted for something; but it had no choice but to acquiesce in the decisions of the council, previously fixed upon at dinner.

49. **Tribal Justice.** — Such was ancient Greek legislation.

Judicial proceedings were not radically different. In some instances, doubtless, the king dispensed justice as sole magistrate. He was generally the richest, as well as officially the first, of the noblemen of the kingdom, and as such must have adjudged many differences between his numerous personal retainers at least, even if he did not often act as sole judge between other litigants. But most cases arising between men of different family groups were heard by the king and his council in the presence of the people, much as public business was considered, each councillor being entitled to deliver his opinion in his turn, and a majority of voices probably controlling.

50. **Patriarch and Priest.** — I have called this presidency of the king in state affairs a 'patriarchal' presidency because it belonged to him by hereditary right, as chief elder by direct descent from the first preferred elder of his people. The family once chosen by the gods to preside in council and command in war was seldom set aside; and the usual succession by primogeniture was rarely departed from. This president-king, besides, had other prerogatives typical of a patriarchal headship. He was the high priest of his people, performing all those sacrifices and leading in all those ceremonials which spoke the family oneness of the nation. He was representative of the nation in its relations with the gods. He was also commander-in-chief in war, here again representing the unity of the people over whom he presided.

51. **Not Lord, but Chief.** — But here the kingly prerogatives ended. These presidential and representative functions of the early Greek king contained the sum of his powers. Aside from his presidency in legislation and in adjudication, his high priesthood, and his command in war, he had little power. There was no distinct idea as yet of personal allegiance to the monarch on the part of the people at large. He received gifts from the people and had the usufruct of the public domain for his support; but these were accorded him rather as father and typical head of his nation than as master. The

services rendered him were largely voluntary. He was not lord, but chief of his people.

52. **The Primitive Δῆμος.** — In one sense the king was not chief of a *people* at all. The Homeric δῆμος (dēmos) was not a 'people' in the modern sense of the term. It was not an association of individuals, but an association of *families*, of families which had widened into *gentes*, but which lived apart from each other in semi-independent groups, each possibly clustering about its own village and living its own separate cantonal life. The king was the head of these confederated 'houses,' and the seat of his authority was that 'city' about which their confederate life centred.

53. **The Antique 'City.'** — This city was as unlike as possible to those centres of population and industry which are the cities of our own time. It was very different even from those Greek cities of historical times of which Athens may be taken as a type, and which were the actual homes of the ruling numbers of the population. The city of Homer's day doubtless contained the dwellings of the king and his assistant priests, but not many besides king and priests, with their families and attendants, lived in it. It was generally a citadel upon a hill to which the confederated families living in the country round about it resorted in times of actual or threatened invasion. It contained the temples of the gods and was the seat of the common worship. In it was the market-place, also, in which the trade of the country-side centred. It saw the festivals, the sacrifices, the councils, the courts, the armed musterings of the people. But it did not see their daily life. That was not lived in common, but apart in clans. Each 'house' was a complete independent organism in itself, with a very vital corporate existence. It "had its assemblies; it passed laws which its members were bound to obey, and which the city itself respected."[1] These assemblies were presided

[1] Coulanges, *The Ancient City*, p. 137 (Am. ed.).

over by an hereditary chief who was priest, judge, and military commander of his house — its king, a chief among the heads of its branches. Throughout the *gens* there was the closest brotherhood. It had its common family worship, its religious festivals, its common burying-place. Its members could inherit from each other, and were ultimately responsible for each other's conduct and debts. They could not accuse one another before any tribunal but that of their own kindred. They stood together as one family under a complete family government.

54. **Confederate Growth of Family Groups.** — The monarchical city had not originated directly from a confederation of families. It had been developed through a series of other combinations, which, in their religious functions at least, continued to exist after the city had come into being. *Gentes* had first of all united, for the celebration of some common worship, into *Phratries* or (in Latin term) *curies*. *Phratries* had combined, from like motives, into Tribes. It was by a coming together of Tribes that the city had been formed. Each *Phratry* and Tribe had realized the family idea by the worship of the same gods, and the canonization of some common hero as their eponymous ancestor; and each had elevated a chief to its presidency and high-priesthood. Each had its assemblies and its festivals.

55. **The 'City' a Confederacy of Gentes.** — But though the city was the next step of confederation after the tribe, it was not tribes, nor yet *phratries*, but *gentes* which were represented in the council of the king. There was, so to say, a subsidence of political organization upon this older foundation of the family. In the city the tribe continued to be a unit of worship, the *phratry* a unit of worship and of military organization; but only the *gens* was a unit of civil organization. The army was grouped by *phratries*, but government was constituted by families.

56. "The city was not an assemblage of individuals; it was a confederation of several groups, which were established before it, and which it permitted to remain. We see, in the Athenian orators, that every Athenian formed a portion of four distinct societies at the same time; he was a member of a family, of a phratry, of a tribe, and of a city. He did not enter at the same time and the same day into all these four," like an American, who at the moment of his birth belongs at once to a family, a county, a state, and a nation. "The phratry and the tribe are not administrative divisions. A man enters at different times into these four societies, and ascends, so to speak, from one to the other. First, the child is admitted into the family by the religious ceremony, which takes place six days after his birth. Some years later he enters the phratry by a new ceremony. . . . Finally, at the age of sixteen or eighteen, he is presented for admission into the city. On that day, in the presence of an altar, and before the smoking flesh of a victim, he pronounces an oath, by which he binds himself, among other things, always to respect the religion of the city. From that day he is initiated into the public worship, and becomes a citizen. If we observe this young Athenian rising, step by step, from worship to worship, we have a symbol of the degrees through which human association has passed. The course which this young man is constrained to follow is that which society first followed." [1]

57. **The Elders.** — The real inner life of government dwelt, therefore, not in the authority of the king, but in the power vested in each member of his Council. As head of a *gens*, each Elder exercised those prerogatives of the father-sovereign about which, as about a support, society had attained all its earliest growth. As a Council, the Elders were confederated chiefs, representing each a little family sovereignty. It is not, perhaps, a too far-fetched fancy to liken them to the members of our own federal Senate. Just as our own Senators represent self-governing states, confederated for certain purposes, so did these Elders represent self-governing family groups joined in the pursuit of certain common objects. Of course the likeness disappears the moment we look outside the Council, away from its internal organization. Our Sena-

[1] Coulanges, *The Ancient City*, pp. 169, 170.

tors are elected representatives, and have only representative functions. They have no official voice in the direction of the affairs of the states which they represent. Those ancient Greek Elders, on the contrary, were hereditary chiefs, and had weight in the Council because they were rulers at home in their several cantons. The language of their day commonly designated them 'kings.' They were kings: the president of their Council was 'the' king, their leader in war and in religious observance.

58. **Religion: the Priesthood.** — The key to the whole composition of this early society was its religion. The functions of father, chief, and king; the constitutions of family, phratry, tribe, and city — all hung upon certain deep-lying religious conceptions. The father was first of all high-priest of his house, the chief first of all high-priest of his phratry, the king first of all high-priest of his city. Their other functions rather flowed from the authority of their priesthood than were added to it. Religion was the one conclusive motive and sanction of all social order in that early time, as it continued to be for many centuries afterwards; and the heads of religion were of course the rulers of society.

59. It was the leading peculiarity of the religion of that time that each father, chief, and king represented gods whom no one else represented. The gods of one family were never the gods of another family, the gods of one phratry or city, never those of another phratry or city. Gods were in that day private, not common, property, and were owned inalienably. Each high-priest of the series, therefore, had a peculiarly sacred and distinctive character within the group over whose worship he presided, and in that character were contained the seeds of all his other prerogatives. He was chief of the religion of his group; and that religion was the supreme rule of its life. He was, therefore, its king; and his office was hereditary. The sacred priesthood of the father could be transmitted only by natural succession. Priests could not be made, unless, in the

providence of the gods, they were not born. Then human choice must be resorted to; but that choice must keep itself as close to the direct line of the priestly stock as possible. It must select within the chosen family.

60. **Primogeniture.** — It is because of the rule of such conceptions of civil magistracy, as an authority resulting from the priestly functions of the head of each social group, that we find primogeniture the ruling order of succession alike to eldership, to chieftainship, and to kingship; and it is because of this same rule of religious thought in social organization that we find every magistrate, even those of the later times when magistrates were elected, exercising some priestly function, as if to supply a necessary sanction for his civil powers. The magistrate was always next to the gods, was always their interpreter and servant.

61. **The City's Religion.** — In every way the political life of the city spoke of religion. There was a city hearth in the *prytaneum* on which a fire, sacred to the city's gods, was kept ceaselessly burning; there were public repasts at which, if not the whole people, at least representatives daily sat down to break the sacred cake and pour out the consecrated wine to the gods: the council-feast to which the king invited the Elders (sec. 48), though also a social feast, was itself first of all a sacred, sacrificial repast over which the king presided by virtue of his priestly office. There were festivals at stated times in honor of the several deities of the city; and the Council (which at a later day became the Senate) always convened in a temple. Politics was a religion.

62. **Decay of the Antique City.** — Such seems to have been the universal first model of completed political society in the Greek world. When it comes within our view in the Homeric songs, however, it is already old and near its end. It was the complete and singularly logical result of that widening from family to tribe which had filled the ages of human life which had gone before it. It was the true offspring of its long an-

cestry: a greater family descended from a long line of families. But when we catch our first glimpse of it, the end of the pure family state is at hand. A series of revolutions is about to change the whole organization of political society.

63. This change, however, did not proceed everywhere with that universal uniformity which seems to have characterized previous developments in the Greek world. Similar changes were effected, indeed, everywhere; but differing circumstances gave to change a different speed and a varying form and sequence in separated localities. It was not so much a continued development as a differentiation. It will be best, therefore, to continue our examination of the further modification and expansion of Greek institutions by studies of the histories of the particular cities of Greece; and it is almost unavoidable that the particular cities chosen for this purpose should be Athens and Sparta, inasmuch as it is only of these two masterful cities that we have anything like adequate knowledge.

64. **The City absorbs its Constituent Parts.** — There is, however, one uniform process first to be noted amongst all the governments of historical Greece. City life continued everywhere; but the government was no longer cantonal. It was municipal. A 'city' was no longer merely the confederate centre of separated family cantons in which the real life of the people still dwelt. That life had become much more largely and truly a united life. The city no longer received its vitality from the family governments round about it; they, rather, derived their significance from their connection with the city. The city was now, instead of a mere compound or aggregate, a whole, of which tribes, phratries, and families were parts. The confederation had, so to say, swallowed up the confederates. The city, a child of family government, had subordinated family government to itself; had usurped a full supremacy, making its parents its subjects.

65. **Decline of the Elders' Separate Powers.** — We have not the historical materials for making quite plain the why

and wherefore of this notable transformation in political order; but we can see dimly some of the causes which must have brought it about. By coming together under the early city organization the aforetime sovereign family governments necessarily lost much of their former importance. Confederation inevitably lessens the individual importance of the confederates. They have no longer their accustomed separate prominence; that has been swallowed up in their aggregate weight. However small might have been the power of each family group when it was dissociated from its neighbors, its complete independence gave it a dignity, a cohesiveness, an individuality, and a self-sufficiency of which association with others robbed it. After the independence of the family had been curtailed by confederation, the strongest motives for preserving family organization intact would be displaced by wider interests. The generation which saw the 'city' formed would of course not dream that family importance had been in any wise impaired. The Elders of the first councils would abate not a jot of their hereditary pride of blood and of authority, but would deem themselves as great kings as ever. And in those times of reluctantly changing thought scarcely an element of altered conception in regard to these matters would enter for generations together. But, whether sensibly or insensibly, profound modifications both of social thought and of social practice would at length take place. Relegated to a subordinate rank in the political order and no longer obliged to preserve that constitution which had been essential to it while it continued itself an independent government, the *gens* would by degrees lose its close integration and compact organic structure. A kingdom within a kingdom is a difficult thing to keep alive. Its members are confused by a service of two masters, and end by really serving only one, — and that the stronger.

66. **Political Disintegration of the Gens.** — The family died, therefore, as a political organization, for lack of sufficiently important functions to keep it interested in itself. It

was gradually disintegrated. In religion, indeed, it steadily remained one for centuries, formally at least, if not practically; but in other things it fell slowly apart. Its branches became by degrees more and more independent of each other. Its property was no longer held in common, but was divided with greater and greater freedom, and with less and less regard for that law of primogeniture which had formerly made the eldest-born son of the direct line the sole proprietor, as trustee for his kinsmen, of the family lands and goods. In the end, this eldest son got not even the largest share of the property, but divided it equally with his brothers.

Here, then, was an almost complete dismemberment and disintegration of the *gens* as a political unit in the larger government of the city. That larger government had superseded it in all the great functions of social control. Its private interests and prerogatives were no longer sufficient to hold it together. Its members had become *citizens*, and their citizenship had eclipsed their membership of the family. The only politics worth competing in was the politics of the city. The cantons no longer constituted but depended upon the city.

Athens.

67. **The City of Solon: Kingship gone.** — The first distinct view we get of Athenian affairs reveals the changes already described in large part accomplished. We may be said to get that first distinct view in the time of Solon, to whom Athens attributed her first great reform code. The Solonian constitution is by no means so well known as historians wish that it were; but several of its main features may be said to be beyond dispute, and these features speak very plainly of a society quite unlike that of the prehistoric Greek 'city' which we have been considering. Homer would hardly have recognized the city for which Solon legislated.

Solon was put in charge of the city's affairs by being chosen

'Archon.' What was an 'Archon'? The ancient 'city' had known no such officer. Did he act for the king, or was he of the Council? Neither the one thing nor the other. The ancient kingship had disappeared, the archonship was one of its fragments. The abolition of the kingship had doubtless come about through an aristocratic revolution, such as Aristotle afterwards noted as altogether a normal movement in Greek politics. The 'kings' of the Council had grown by degrees quite intolerant of the authority of *the* king, their patriarchal president. He stood for the growing state; they, only for the disintegrating *gentes*. His hereditary headship was threatening to overshadow permanently their individual part in affairs. They therefore determined to control his office, to make it dependent upon themselves. Codrus, the last king of Athens, is said to have sacrificed himself in a war with Peloponnesian foes, because of a prophecy that the enemies of Athens would be victorious unless the life of her king were yielded up in the contest, and it is added by the tradition that the Athenians thereupon abolished hereditary kingship by way of emphasizing their belief that no one was worthy to succeed Codrus. Possibly we are not at liberty to discredit all of the pretty story; it is such a story as we would not discredit if we could. But we may feel assured that there were other potent reasons in the minds of the ruling men of the city why Codrus should be the last of her kings, and that they were quite clear in their determination that, if not Codrus, then some early successor of his should be the last of the hereditary monarchs of Athens.

68. **The Archonship.** — They did not, however, transform the office at once into an elective magistracy. They could not. Both unreasoning religious belief and calculating policy would have forbidden any such violent breach in the ancient order of the family-state. To all outward appearance only the name of the office was changed. Codrus, who had been *Basileus* (king), was succeeded by his son under the title Archon

(ruler). That was all. And the office of archon was held by descendants of Codrus in strict hereditary succession for about three hundred and sixteen years. It is evident, however, that this change of name in the chief office of the state covered, perhaps without altogether concealing, many important changes in the conditions of its tenure. If Codrus had inherited too strong prerogatives, the archons, his successors, exercised those prerogatives in more or less strict subordination to the noble families represented in the Council. The monarchy had been made a limited monarchy. The archon was responsible to a watchful House of Lords.

69. **Nine Archons.** — At length the hereditary archonship was in its turn done away with. The archon's tenure of office was limited to ten years, the archon being chosen, doubtless, by the Council, though still always chosen — so tenacious was the idea of the hereditary character, the fathership, the kin-headship of the ruler of the state — from the family of Codrus. But the hereditary principle was at length in decay; and the first assured date in Greek history shows us its end. In the year 683 B.C. the archonship was made annual, its functions were divided up amongst nine offices, and to these offices all *Eupatrids* (all, that is, who were of the old kinship of the family-state) were made eligible. The honorary chief of these nine archons was called Archon *Eponymus*, because from him the year took its name in all official records; the second of the nine was called Archon *Basileus*, because he was the city's high-priest, and thus successor to the most typical of the old kingly functions; the third was Archon *Polemarchus*, having received the military command once belonging to royalty; the other six were *Thesmothetæ*, judges. Kingship had been 'put into commission.' It was parcelled out among the members of what we should call a 'board' of archons. The whole executive direction of the state was doubtless in the hands of this board, but their most prominent functions were judicial. They were all judges. Upon the chief archon devolved the

weighty duty of determining cases of family law and inheritance; the king-archon adjudicated the then numberless cases which religious law controlled; the archon polemarch heard all cases between foreigners; the six Thesmothetæ decided such cases as belonged to the jurisdiction of none of the three principal archons — all cases not otherwise assigned. There were, moreover, certain judicial functions which the nine archons exercised jointly, such as the punishment of banished persons who had broken their banishment, the oversight of the balloting for certain minor judgeships, the presidency of certain meetings of the people, etc.

70. **Solon Archon Eponymus: the Crisis.** — Such was the changed magistracy of Solon's time. Solon was chosen Archon Eponymus, but with powers such as no archon ever regularly possessed. He was chosen at a crisis, — a crisis which by its very existence reveals a society radically unlike the society of kinship described by Homer. There are three contending parties in the state, — the men of the mountain, the men of the shore, and the men of the plain. Neither the men of the mountain nor the men of the shore would have been so much as counted in the Homeric state. They were not of the immemorial kinship at all. They were the tillers of the soil, holding their lands of the noble families who lived in and about Athens, and who constituted the third party, of the plain. They were outsiders to the state. The noble families were the state; these men of the mountain and the shore were their subjects, for the most part their slaves, bearing every burden, and sharing not a single privilege. Every movement which they had made towards even a partial independence had compelled them to borrow capital of their masters and so had clinched their slavery. The men of the shore, the men, that is, tilling the generous soil of the lands which stretched across the southernmost portion of the Attic peninsula to famous Sunium, were much better off than the men of the mountain, who had both the exclusiveness of the law and the niggardli-

ness of nature to contend with, in the mountainous districts to the north; but both hated the privileges of the Eupatrids, and were ready to combine in order to wreck them. The one could not, the other would not, any longer abide content with a lot which forbade them all independence and all hope of a voice in the determination of their own destinies. The men of the coast would have accepted moderate concessions: the poor peasants in the mountains clamored for radical measures; but both would have something done. The Eupatrids, with their submissive retainers on the plains about the city and the port, were in a numerical minority, though doubtless strongest in resource, and deemed concession unavoidable. Solon was a man of advanced age and of established reputation, alike for courage, for honesty, and for wisdom. All parties turned to him with hope and trust. He was chosen archon, invested with extraordinary legislative powers, and bidden make a constitution just to all alike. This was in the year 594 B.C.

71. **The Draconian Code.** — Twenty-seven years before a somewhat similar task had been assigned to Draco; but he had failed through too great conservatism. He had framed a code which had rather made the old laws public and certain than rendered them equitable. If anything, the definiteness which he gave the law had added harshness to it by making it stiffer and more inexorable than before. It was Solon's part to reform the institutions of the state. The time for mere revision had gone by, and the time for reconstruction come. Draco's legislation had been followed by the explosion of an attempted revolution; Solon's must be followed by satisfaction and peace.

72. **Solon's Economic Reforms.** — And Solon certainly proceeded with courage and thoroughness; the results of his work showed that he proceeded also with wisdom. He instituted both economic and constitutional reforms, which, though conservative enough to force no too rude or sudden break with the past, were decided and timely enough to assure the future

of the state. We are concerned here with his economic as well as with his political measures, because the former were the necessary foundation for the latter. It was necessary to free the poor before enfranchising them. Accordingly Solon struck off, first of all, the chains of debt which bound them, not in property only, but in person as well, to the moneyed Eupatrids, their landlords and creditors. Their debts were remitted and their persons freed. A reforging of their chains was prevented by a law which forbade the pledging of the debtor's person as security for debt. Besides freeing the workers of the soil, Solon himself tells us, in a fragment of his curious narrative and didactic verses, that he freed also the land itself by removing certain stone pillars from it. There is a controversy amongst historians as to the meaning of this statement, as there is as to so many of the other events of that remote time. We must either believe that the pillars removed bore record of mortgages, or — failing to credit so early a development of a seemingly rather modern system of mortgaging — we must conclude that these pillars were boundary stones sacred to those most revered gods, the gods of boundaries, and that they marked the inalienable ownership of the land by the Eupatrids, whose gods these were. To remove mortgage records would be only temporarily to free the land from its bondage to the moneyed classes, for new mortgages might be made; but to remove the boundary pillars which marked, with sacred signs hallowed by superstition, the immemorial proprietorship of the Eupatrid families, would be to make a division of estates possible, and eventual peasant proprietorship, when prescription was no longer disproved by those witnessing pillars, at least a thing to be hoped for. The one measure would free the land only for a term; the other would free it, possibly, 'for good and all.' But either would free it; and, whichever may be within Solon's meaning, it is clear that his whole scheme of economical reform was intended to better the condition of the classes hitherto not reckoned of

the state at all. Industry was at least put in the way of earning its just reward. Even men not of the noble blood were to be given leave to thrive and, mayhap, grow rich.

73. **Solon's Political Reforms: the Four Property Classes.** — The next step was to make wealth the patent of political privilege. And here we come to Solon's political reforms. He divided the citizens of the state into four classes according to wealth. Their wealth was classified according to their incomes, reckoned in measures of grain, or of oil or wine. The first of these property classes was to consist of those who received yearly at least five hundred *medimni* of corn or measures of oil or wine from their estates. The members of this class, therefore, were to be called *Pentacosiomedimni* (five-hundred-*medimni*-men). The second class were to be three-hundred-*medimni*-men; the third, one hundred and fifty. The fourth class embraced all not included in the other three, 'the masses,' as we should say. The members of the second class were called also *Hippeis*, or knights, because upon them devolved cavalry service in the army; the members of the third, *Zeugitæ*, because they had property enough to require the employment of a yoke of draught animals; the members of the fourth, *Thetes*, because they were, for the most part, laborers for hire.

74. It will be noted that only landed property is reckoned in this classification. Probably it constituted the mass of property in Attica at that time, though there were traders in the community, and Athens had never had the contempt for commerce and the trades which so long prevailed at Sparta and Rome. Solon himself had bettered his fortunes by merchandising. He had been a merchant before he became a statesman. It was his knowledge of the world acquired in his travels as a merchant, indeed, which constituted a large part of his qualification for the task now assigned him. But personal property was not an important enough element in the wealth of Athenians at that day, it would seem, to be accorded politi-

cal weight. The Eupatrids were of course the chief landowners. Theirs was still, consequently, the chief part in the state.

75. **Eligibility and Election to Office.** — For eligibility to the highest public functions was confined to members of the highest property class, though the franchise was not. Solon instituted a popular Assembly, in which every citizen, of whatever class, had a vote, and to this Assembly was entrusted the election of all magistrates. To the lesser magistracies any member of the first three classes might be elected; to the chief magistracies, such as the archonships, only members of the first class *who were also of Eupatrid blood* could be elevated. Solon was not breaking with the past. Blood still counted for much. The old families were still to conduct the affairs of the state, though now only after popular election.

76. **The Assembly and the Senate.** — The popular Assembly was not only an electoral, it was also a legislating body. Certain subjects were always to be submitted to its vote. But it was not the only or the highest deliberative assembly. Solon instituted a *pro-bouleutic* (pre-determining) Senate of Four Hundred, by which all business to be brought before the popular Assembly was to be first digested and prepared, and without whose preliminary decree no business at all, aside perhaps from the elections, was to be submitted to that subordinate body. The four hundred members of this Senate were to be chosen (one hundred out of each of the four tribes into which the people were from of old divided) from the first three of the property classes. This Senate probably succeeded, in general, to the political place formerly occupied by the ancient Council of Elders. It could, in its discretion, dispose of most matters finally, without consulting the popular Assembly. The Archons doubtless had presiding seats in it, as they must previously have had, as successors to the kings, in the ancient Council. The election of senators, like that of archons and all other magistrates, took place every year, the Senate's authority being as brief as it was great. The popular Assembly, on the other

hand, was from the nature of the case a perpetual body. Men of all four of the classes, every one who was reckoned a citizen, being of its membership, not even variations in the body of wealth affected its composition. It always included all citizens.

77. **The Senate of the Areopagus.** — At the top of the state stood a still higher tribunal, the Senate of the Areopagus. The origination of this council is sometimes attributed to Solon. He did not originate it; he only gave it new form and an altered jurisdiction. He constituted it "a supreme supervisory authority, whose duty it was at once to watch over the collective administration, the behavior of the magistrates in office, the proceedings of the popular Assembly, and, in cases where it was required, to interpose; while at the same time it was bound to deal with the public discipline and the regulation of conduct in the most general sense of those terms, and in consequence possessed the right of bringing private individuals to give an account of objectional behavior on their part."[1] Not all of these functions were new. Possibly no one of them was. It may be that the only Solonian feature in the powers of the Areopagitic Senate was their limitation. For there is good reason to believe that this council which sat on the Areopagus was the ancient Council of Elders. Solon stripped it of its legislative functions, its immemorial initiative in state affairs, and constituted the Senate of Four Hundred, with its briefer tenure and its more direct responsibility to the people, to receive them. The ancient Council retained only functions of oversight and of discipline. The Four Hundred were thereafter *the* Senate; while the body whose greatest prerogatives they had taken became only the Senate 'of the Areopagus.' The traditional rules with reference to the composition of the latter were also set aside: its exclusiveness was invaded by the provision that its members should be supplied "from those out-

[1] Schömann, p. 332.

going archons of each year who had held their office without blame."[1] Membership continued, however, to be for life, as of old.

78. **The Judiciary.** — Little formal change was made in the duties of the archons. They retained their judicial functions almost intact. But their judgments were made to be subject to revision by a higher and more popular tribunal, the *Heliæa*. The *Heliæa* was a body of jurors chosen annually — whether by lot or election is not known — from the whole body of the people. There were also local justices who administered the law in minor cases in outlying districts of Attica. The archonal courts thus became for the most part only courts of 'first instance,' no longer rendering final judgments, but delivering their decisions subject to appeal to the *Heliæa*. In hearing criminal cases, moreover, the *Heliæa* was often the first and only tribunal. Its civil jurisdiction was altogether on appeal. Here was certainly a very much popularized judiciary.

79. **The New Principles introduced.** — Such was the constitution of Solon. Great as were the changes of form which it introduced, important as were the changes of principle which it effected, it was throughout wrought in a conservative spirit. It promised profound alteration, but it did not threaten rapid alteration; and it forced no revolution at all. It left the noble families in power; but it placed their authority upon a foundation of popular consent, and bounded it on its judicial side by an appeal to popular jury courts. It introduced wealth as a standard of political privilege, and so gave potency to a principle which would inevitably antagonize and in the end oust the idea of hereditary right: but for the present it added to requirements of wealth requirements of blood also. The Eupatrids were still to hold the great offices, but only those among them were to be eligible who possessed the further qualification of abundant incomes. The next step, which he

[1] Schömann, p. 332.

did not take, would be to make wealth the only qualification for power. Before another century passed over the head of the new constitution we find that change accomplished.

80. **Pisistratus and the Solonian Constitution.** — In one sense the constitution of Solon did not succeed; in a wider sense, however, it had the highest possible success. It contained the elements which made up the constitution of his city in the later times of her greatest glory. It pointed out the way to all subsequent successful reforms. But for the moment it lived only by the sufferance of its enemies. Solon had, in the eyes of the Eupatrids, done too much. They saw an end to their exclusive privileges in accepting the principles of his legislation. In the eyes of the men of the mountain and the shore he had done too little. Fomented by interested parties, no doubt, the old strife broke out afresh, and Solon's own nephew, Pisistratus, uniting the popular parties in his aid, seized and finally held dictatorial power. Here was a sad outrage to the principles which Solon had striven to establish! But, in reality, it was probably the success of Pisistratus that kept the Solonian constitution alive for the peaceful uses of later times. Amidst the clash of factions it would probably have been trodden into the ground, to be forgotten, had not Pisistratus, willing to preserve so much of its machinery as suited his own purposes, upheld it by his own despotic power. Its forms were more popular than those of the constitution it had been meant to supersede; he was, professedly, the champion of the popular cause; it was politic that he should retain the most liberal institutions at hand. He therefore affected only to preside, with certain supreme and extraordinary powers, over the constitution set up by his uncle. Solon lived to witness his nephew's unlawful triumph and to utter an intrepid protest against such mockery of his aims. But Pisistratus kept his usurped powers to the end of his long life and handed them on to his sons, preserving, even if in mockery, at least the hull of the institutions created by Solon; and when his

sons, forgetting his prudence and failing to imitate his wisdom and moderation, were driven from the throne he had established for them, enough of the Solonian constitution remained to serve as a basis and model for lasting reforms.

81. **Clisthenes.**— The new reformer, who was to complete the work of Solon, was Clisthenes. He was a pronounced champion of the rights of the people, and began his career in Athens by defeating those who, under the leadership of Isagoras, attempted, after the expulsion of the Pisistratidæ, to restore the old-time domination of the Eupatrid families. The next step was to secure the permanency of his success by establishing a constitution which should be genuinely a constitution for all the people.

82. **The New Demes and the New Tribes.** — It was plain that the first thing to do was to contrast the policy of Solon by refusing all special privileges to Eupatrids as Eupatrids. They must take their chances of political preferment in competition with all other citizens. Solon had reserved the chief offices for them and had constituted the Senate of Four Hundred of representatives of those four tribes of immemorial origin which, being aggregations of the sacred *gentes* and *phratries* which were the strongholds of Eupatrid kinship, were themselves, in a sense, exclusive aristocratic associations. Clisthenes admitted to office all who belonged to the first three property classes and altogether ignored the old tribes in making up the Senate. The four tribes continued to exist, as religious, ecclesiastical organizations; but they ceased to count for aught in the political structure of the state. They lost all political significance. Clisthenes first increased the number of citizens by admitting many, some of whom were manumitted slaves, hitherto excluded. He then divided the territory of Attica into one hundred administrative districts which he called *Demes*. These demes he combined, by tens, into ten tribes; and these tribes it was which, having appropriated the name of the greatest units of Eupatrid organization, super-

seded them also in the Senate. The number of the senators was raised from four to five hundred, and the Senate was constituted of fifty representatives from each of these new tribes. Any reputable citizen was made eligible to a seat in the Senate.

83. **The Arrangement of the Demes.** — All this would look like startling innovation; but Clisthenes' course was not quite so radical as would at first sight appear. His tribes were new; but the demes were most of them old, having only received from him new functions and a new significance. The territory of Attica had already for a long time been divided into small districts centring in villages and hamlets and bearing this name of Demes. Clisthenes only limited their number to one hundred, probably not very materially altering existing boundaries or very often merging small demes into one of proper size, and made them the constituent units of his new tribes. One of the most curious and most characteristic features of his scheme was, that the ten demes which went to make up a tribe were never ten contiguous demes. Neighboring demes were separated in political function by being assigned to different tribes. The demes lying within Athens itself, for instance, belonged to no less than five of the tribes. Each tribe had its demes scattered here and there in separated portions of Attica. The object of this singular arrangement was to break the backs of the old factions of the plain, the mountain, and the shore by joining in interest and in political action the demes of the various sections. Sectional feeling was to be thus weakened by bringing the sections into constant and intimate co-operation, and sectional action impeded by depriving the sections of political cohesiveness.

84. **Religion and the Tribal Organization.** — The plan was quite artificial, though the materials out of which the new tribes were made were old and familiar materials; but it could not well have been otherwise than artificial. Religion and its imperative prejudices forbade any dilution of the genuine Attic *gentes*, which were the core of the old tribes, by the introduc-

tion of new citizens of no birth at all. The old organizations could not be *popularized* without committing something very like sacrilege; and since they could not be reformed, the only thing left to do was to replace them. The only way to do that was to create entirely new political materials. Hence the new tribes were formed, and given their own ecclesiastical functions in imitation of those of the old tribes. There could be no organization without its special priesthood and religious observances: the old organizations could not open their sacred mysteries to any not of the real or adopted kin. The best thing to do, therefore, was to put aside the old family unions altogether and make up a new congeries of associations with their own worship and their own internal governments, which, if artificial at first, might be expected in time to acquire a vitality and a dignity as substantial and as lasting as those of the Eupatrid dispensation. This, accordingly, was done. The new tribes adopted eponymous heroes, the statues of these patrons were set up in the Agora, where their tribes might gather about them when assembled for consultation; and politics was asked to forget the Eupatrids.

85. **Expansion of the Popular Jury Courts.**— The next step in the popularization of the constitution was a still further extension of the jury court system. The number of Heliasts was increased, and it was provided that they, like the senators, should be chosen proportionally from the ten new tribes. Since the new tribes contained many who had never before been citizens and some who had once been slaves, this expansion of the popular jury-system must of course have been of great consequence as a step towards democracy.

86. **The Ten Strategoi.**— Clisthenes transferred the command of the military forces of the city from the Archon Polemarchus, whose functions Solon had left untouched, to ten *Strategoi* (generals), to be annually elected, one out of each of the new tribes, by the Assembly. Or, rather, these generals were associated with the War Archon, overshadowing him, if

not in dignity, certainly in power, and destined afterwards to oust him, and indeed others of the nine archons, from many other duties of administration.

The relations of the strategoi to one another are illustrated in an interesting way in connection with the battle of Marathon. They took turns, day by day, in the command when in the field. It was on the day of Miltiades' command that Marathon was fought, though the others are said to have yielded their commands to him on the days which preceded the battle.

87. **Ostracism.** — Clisthenes was determined that no Pisistratus should use the new constitution for his own ends. He therefore completed his work by adding the law of Ostracism. This is a law much scorned by commentators of our own modern times, when democracies are too strong and self-possessed to fear the wiles of demagogues; but there can be no question amongst those who understand the times and the state for which Clisthenes was legislating, about the wisdom of establishing such a law in Athens. Its provisions were not harsh. It enacted that whenever it appeared that some one statesman was gaining such an ascendency over the people that he might, if he chose, use it unlawfully for his own advantage, as Pisistratus had done, or employ it to raise his rivalry with some opponent to a dangerous pitch of bitterness, the Senate might call upon the people to declare their opinion as to whether any one should be temporarily banished from the state. When the Senate called for the vote, no names were sent down to the people. There were no forced candidates for ostracism. The question was simply, Is there any one in Athens of whom it would be to the advantage of her peace and tranquillity to be rid for a season? Each voter made up his own ballot. If six thousand ballots contained the name of the same man, that man must leave Attica and her possessions for ten years. Six thousand votes were probably more than a third of the total vote of Athens. Although a minority, therefore, could compel the retirement of any public man, it must

have required a very strong and well-grounded movement of public opinion to bring about this concerted action of six thousand voters against one man. A very evident propriety in banishing him must have existed before so many people would see it and declare it. That ostracism was not a weapon easy to use is shown by the striking infrequency of its use, and by the steady decline in its employment. It was a vital element of the constitution at first, but as that constitution gained greater and greater assurance of permanence and stability, it more and more decisively cast aside an instrument which, after all, was an instrument for the weak and not for the strong; and ostracism fell at length into utter disuse. Not, however, before it had done its appointed work. It had unquestionably given the new constitution time and assured peace in which to grow. It had afforded the people an opportunity to acquire a steady political habit and an habitual "constitutional morality" such as they might never have attained to had the rivalries of party leaders had no check placed upon them, and had political intemperateness had no punishment to fear. It taught them to restrain their leaders, and so taught them to discipline themselves. By guarding themselves against being hastened into revolution they learned what tended towards revolution. By defending their constitution against designing men they learned what that constitution was in its spirit as well as in its letter. They learned which were the right paths in politics by taking care not to be seduced into wrong ones. One never finds out all the meanings of his creed, be that creed political or religious, until he has to defend it against attack: and when one has learned to handle foes within the gates, the defence of the outer walls has become a matter of assured success.

88. **Success of the Clisthenian Constitution.** — The success of the reforms of Clisthenes is beyond question. Their quality was put to an early and severe test — the test of the fiery days of Persian invasion and of the exaltation of the

years that followed, when Athens was indisputably the leading state in all Hellas and formal head of a great alliance (secs. 129, 130): and the test only confirmed their strength. Athens received political life from the hands of Clisthenes, and her constitution retained substantially the form he had given it until the days of real independence and of merited glory had altogether and finally departed from the shores of Cephisus and Ilissus. We have, therefore, only to trace the changes of the intervening years to complete our view of this greatest government of Greece.

89. **The Persian Wars and the Extension of Political Privileges.** — The Persian wars wrought important changes in the economical condition of Athens. The country had more than once been laid waste by the Persians, and such ruin had resulted to the owners of land that probably very many who had once had rank in the first of the property classes had sunk to the last. Landed estates, the only estates hitherto reckoned in the census of wealth, had been, temporarily at least, rendered almost barren of income. Personal property gained in trade had, on the contrary, much increased, and had been in large part saved from the clutches of the invaders. Athens, in short, had become a commercial state, and because a commercial state naturally a naval state also. There unquestionably grew up among her citizens a very considerable and influential body of merchants possessed of much wealth, and yet by reason of their lack of real estate, ranking no higher than the poorest *Thetes*. We can understand the considerations, therefore, which, soon after the battle of Platææ, led Aristides to propose, and the city to consent, that eligibility to office should be extended to all classes of the people, irrespective of any inequalities of wealth.

90. **The Policy of Pericles.** — When Pericles came to the front of affairs in Athens, therefore, the constitution wore the features of a complete democracy. The influence of Pericles, although permanent beyond the example of the politics of

most democratic states, rested, not upon usurpation, but upon his commanding influence with the people; and the whole of his policy was directed, by intention at least, towards the education of the people in the tasks of government and the standards of conduct which belonged to Athens as the leading state of Greece not only, but of Hellas as well. It was under his inspiration that Athens was filled with the splendid monuments of art and architecture which have given a special distinction to the 'Age of Pericles.' It was at his suggestion that the people were voted small payments for their attendance at the jury courts and the assemblies, besides a largess to enable them to attend the exhibitions in the theatre. The theatre played a large part in Pericles' plans for the education of the populace: no means were to be neglected which might serve to quicken the judicial and political activities of the people, or strengthen Pericles in their favor.

The policy of thus paying the people to perform their duties and to be amused was, nevertheless, in the end a fatal one. So long as a Pericles dominated, all went well; but so soon as the city lost Pericles and forgot the fashion of statesmanship which he had set, much began to go ill. The majority of the citizens soon came to prefer paid service in civil offices to the necessary service in the field of battle. They were not long in becoming mere lethargic pensioners of the state.

91. **Constitutional Reforms of Ephialtes.** — The final steps in revising the republican constitution of Athens were taken by Ephialtes. At his suggestion all offices except those of the *strategoi*, who had absorbed the most important executive functions of the state, were filled, not by election as theretofore, but by lot;[1] and the powers of the Areopagus were further curtailed. By a law proposed by Ephialtes in B. C. 460 the Areopagus was deprived of its oversight of the consti-

[1] It is not quite certain whether choice by lot was introduced by Ephialtes or earlier by Aristides. See Gilbert, *Handbuch der Griechischen Staatsalterthümer*, pp. 146, 147, and authorities there cited.

tutional life of the state (sec. 77) and of the private life of its citizens and its jurisdiction limited to the single matter of blood-guiltiness. In the stead of the former disciplinary powers of the Areopagus, a similar duty of supervision was imposed upon a board of seven *Nomophylaces*, or guardians of the law.

The introduction of election by lot was probably rendered comparatively innocuous by the fact that the functions of the ordinary magistracies had been greatly curtailed in importance by the institution of the popular jury courts and the concentration of administrative duties in the hands of the generals. Any man not lacking in sense might now fill a magistracy without serious fault.

92. **Decline of Athens.** — Such was the constitution of Athens when the calamities came which marked the close of the Peloponnesian war and the beginning of the final decline of Athenian power and independence (secs. 131–133). This time of decline — ending with the victory of Macedonia at Chæronea in 338 B.C. — witnessed one or two temporary returns to oligarchy, and many proofs of a sad decline in political morality on the part of the people. Their pay for service and their largesses for pleasure were, of course, increased, constant depredations were made upon the rich, and the naval and military reputation of the city was given over into the keeping of mercenaries. But the Clisthenian constitution was retained in substance to the end.

93. **The Metœci.** — Our view of Athens will now be complete enough for our present purposes when we shall have noticed the non-citizen classes, — the slaves and the *metœci*. The Athenian democracy illustrated the character of all ancient democracies in confining the franchise to a small minority of her population. Besides her citizen population, which may be placed at ninety thousand, she had a slave population four times as great (namely, about 365,000), and a population of resident aliens (*metœci*) which was, in pros-

perous periods, about half as great (45,000). The class of *metœci* was composed principally of foreigners, among whom were Lydians, Phrygians, Syrians, and Phœnicians, as well as Greeks from other Hellenic cities, who had come to Athens to take advantage of the exceptional facilities afforded for trade in consequence of her situation and policy, though many manumitted slaves were also reckoned of their number. It was from the ranks of the *metœci* that Clisthenes had recruited the number of citizens, and in later times great numbers of them were often naturalized for democratic purposes. But so long as they remained *metœci* their disabilities were many. Without a special vote of permission they could not acquire property in land in Attica. They were obliged, under pain of a criminal prosecution, followed on conviction by possible slavery, to choose a patron (*Prostates*) from among the citizens as an intermediary between them and the state. It was only through this patron that they could approach the courts to enforce their rights or in any way deal with the state. They were mulcted in taxes as if they were citizens, besides paying a special protection tax and a special fee for market privileges. They had, moreover, to suffer the mental weight of that contempt which, though less pronounced at Athens than elsewhere, all Greeks felt for foreigners. But that their disabilities were not too heavy, and that their privileges were of great moment, is abundantly proved by their numbers alike in times of peace and in seasons of war.

94. **The Athenian Slaves.** — The Athenian slaves were either barbarians taken in war or slaves bought in the slave markets of Delos, Chios, and Byzantium. The vast majority were bought slaves. They not only served as domestics, but also constituted the bulk of the agricultural laborers, miners, artisans, factory hands, overseers, and day-laborers. They also often carried on retail trade, and were sometimes superintendents of larger undertakings, money-changers, etc. Their domestic service often included private secretaryships and the

like. The state itself owned slaves whom it employed as armed police, and even as soldiers. "Further, the lower servants of the public officials — accountants, clerks, criers, bailiffs, prison-attendants, executioners, and the like, were for the most part, the latter invariably, public slaves, as also the workmen in the mint."[1] Slaves and *metœci* supported, the citizens conducted, the state.

Sparta.

95. **Fixity of the Spartan Constitution.** — The circumstances of her history gave to the constitution of Sparta a character in many respects unique, and secured to it an immunity from change which provoked at once the wonder and the envy of the rest of Greece. Throughout almost all of that chief period of Greek history through which I have traced the development of the constitution of Athens — from the time of Solon, namely, till the decline of Athenian power and independence — the Spartan constitution retained substantially the very form it had had when Sparta first emerged into the field of history. All its features are at once ancient and perfectly preserved.

96. **The Spartans a Garrison of Conquerors.** — This singular characteristic of that noted constitution was, as I have said, the natural result of the peculiar history of the city. The Spartans had come as conquerors into the valley of the Eurotas. They were of the number of those Dorians with whose invasion of Peloponnesus visible Greek history may be said to begin, and their hold upon their kingdom had been gained only after many decades — it may be only after several centuries — of hard fighting advanced inch by inch. Their numerical strength was not great, probably at no time exceeding fifteen thousand; they lived in the midst of a forcibly subjected population, from eight to ten times more numer-

[1] Schömann, 352.

ous than themselves; and they had, consequently, to maintain their supremacy rather as a garrison than as hereditary heads of a natural body politic such as had grown up in Attica.

97. **Slaves and Helots.** — There was no such body of slaves in Sparta as we have noted in Athens. Slaves there were, indeed, but their number was never considerable; there being probably only enough to supply the wealthier families with domestic servants. The burden of all the other services that were required in the simple life of the Spartan state fell upon a body of serfs called Helots. The Helots constituted the lowest rank of the subject population of Laconia. They were, doubtless, descendants of the original inhabitants of the country, and owed their degradation to what, had fortune favored them, would have been accounted a reason for giving them all honor, — their desperate resistance to the advance of the conquering Dorians. They are said by some, indeed, to have received their name, of Helots, from a town called Helus which had been the last to yield itself to the conquerors, or the most stubborn in revolt against their dominion when that dominion was young. Their punishment had consisted in being chained, not to masters, but to the land which had once been their own. They were slaves of the soil, rather than of the soil's usurping masters. Though absolutely without freedom, they were not personal property, to be sold or exchanged in the market like the poor creatures who thronged the slave-pens of Delos and Byzantium. They could not change service save as inseparable appendages of the lands upon which they served. They were, consequently, not at the mercy of the individual caprice of their masters, but had themselves something of the inviolability of the property to which they were attached. They passed with it, as part of it, and could not pass otherwise without special legislative warrant. Neither could they be killed or misused by their masters without public authority, or at least some colorable pretext of the public safety. And, inasmuch as they were thus a part of

the real estate of the country, — its motive part, its machinery of production, — and hedged about by the same laws that regulated the usufruct of the land, they were allowed to retain, for the own sustenance, a certain portion of the products raised by their labor, that, as servants of the land, they might derive their support from it. In a sense, they belonged to the state; for the state controlled, as itself supreme owner, the ownership of the land to which they were attached. They looked to the state alone, therefore, for any measure which was to effect their condition for better or for worse: for new restrictions in consequence of their turbulence or threatening discontent, or for emancipation in return for such services as they were occasionally able to render in war.

98. **The Periœci.** — Above the Helots and enjoying a much larger measure of freedom, though scarcely less subject to the will of their Spartan lords, were the *Periœci*. The Periœci are as little to be compared with the Athenian *metœci* as Spartan Helots with Athenian slaves. *Metœci* were, for the most part, resident aliens engaged in trade (sec. 93); *Periœci* were, so to say, captives of the Spartan state, representatives of those older possessors of Laconia who had escaped Helotage by being more submissive than the men of Helus, and who, by acquiescence in the Dorian mastery, had been admitted to what might have been called an alliance with the Dorian invaders, had it not been entered into through sheer compul sion and continued by mere coercion. They were the traders and mechanics of the community; but they followed these occupations, which every Spartan despised, with no such liberty and consideration as the metic might enjoy at Athens, but by the sufferance of their overlords. They owned real estate, but under laws and restrictions not of their own making. They formed separate communes in some of the best districts of Laconia, with their own municipal organizations, but their municipal privileges possibly consisted rather in an opportunity to determine by election which of the Spartans, sent to

live among them as representatives of the sovereign class, should rule them in the chief offices of their towns than in the right to be governed by men of their own class as well as of their own choosing. They had a certain considerable degree of personal liberty, and they were suffered to better their pecuniary position in such ways as they chose; but they were none the less a subject population whose status depended wholly upon the will of the Spartan government. Of that government they formed no part.

Other inferior classes there seem to have been, occupying positions intermediate in point of privilege and consideration between the dependent Helots and *Periœci* on the one hand, and the supreme Spartiatæ on the other; but of them we know little that is satisfactory or significant. Such glimpses as we get of them add almost nothing to our knowledge of Spartan life and politics.

99. **The Spartiatæ: Property Laws and State Guardianship.** — The *Spartiatæ* were the only citizens. The *Periœci* outnumbered them three to one, the Helots probably twenty to one; but only blood counted for aught in the Spartan state, and nowhere was a dominant class more successful in maintaining a rigorously exclusive privilege. Throughout all that period of Sparta's history which is best known and best worth knowing, no democratic revolution made any headway against this active, organized, indomitable band of *Spartiatæ*, who held the state as an army would hold a fortress. Among themselves Spartans were *Homoioi*, Equals; and in the earlier days of their government every means was employed to make and keep their equality a reality. In nothing was this purpose more apparent than in the system of land tenure. There was private property in land among the Spartans; but the state was, as I have said, regarded as the original proprietor of the land, and individual tenure was rather of the nature of a usufruct held of the state and at the state's pleasure than of a complete ownership. The purpose of the early legislation

was to make the division of the land amongst the Spartan families as equal as possible; and the state frequently resumed its proprietary rights and reapportioned estates when grave inequalities had crept in, without a suspicion in any quarter of confiscation. It was a primary care of the state to keep its citizens rich in leisure, in order that they might live entirely for the service of the state and feel no necessity to engage in a pursuit of wealth, which would not only withdraw them from their bounden political duties, but also rob them of social consideration. It accordingly undertook the patriarchal duty of administering the wealth of the country as trustee for the citizens. It not only redistributed estates; it also compelled rich heiresses to marry men without patrimony, and grafted the poor upon good estates by prescribed adoption. It followed, of course, from such laws, that adoption was not permitted to swell the numbers of any family without state sanction being first obtained, that wealthy heiresses were not allowed to throw themselves away on rich youths, and that landed estates could be alienated from the family to which the state had assigned them neither by sale nor by testamentary bequest. Citizens were both wards and tenants of the state.

Doubtless, however, it was only in the earlier periods of this constitution that this patriarchal guardianship and proprietorship of the state was freely and effectively exercised for the purposes intended. It is certain that in later times great inequalities of condition did spring up among the so-called Equals; so much so that they fell at last into two distinct classes, the Few who were rich, and the Many who were comparatively or utterly poor. All *Spartiatæ* were no longer upon the same political level even, but some were *Homoioi* and some *Hupomeiones* (Inferiors).

100. **The Two Kings.** — The government which the *Spartiatæ* conducted is at every point in broad contrast to the government of Athens; though possibly the government of Athens had not been entirely unlike it in principle, previous

to the contests of the factions and the legislation of Solon (sec. 70). Fortune had given Sparta two kings. Tradition held that the Dorian invaders had, upon entering the Peloponnesus, allotted its various districts to their several Heraclid leaders; that Aristodemus, to whom Laconia had been assigned, died before conquering his kingdom, leaving twin sons, Eurysthenes and Procles; that the mother of the boys declared herself ignorant which of the two was born first; that the Delphic oracle, when called upon to arbitrate the claims of the brothers, commanded that they should both be crowned and given joint and equal authority; and that from these two brothers had sprung the two royal houses which reigned in Sparta. Whatever the origin of this double kinship, Sparta had two kings till she had gone far in that decline which preceded Roman conquest. Their functions were not widely different from those which we have seen the Homeric kings exercising. They "were representatives of the state in its dealings with the gods, deliberative and judicial heads of the people in time of peace, and commanders in time of war."[1] The limitations by which their prerogatives were surrounded will appear in what remains to be said of the other institutions of the state.

101. **The Council of Elders.** — In deliberation and legislation they were, still after the manner of the Homeric constitution, associated with a *Gerusia* (γερουσία), or Council of Elders. The members of the *Gerusia*, however, unlike the Elders of the more ancient Council, were elected by the popular Assembly (sec. 103). They were twenty-eight in number (constituting, with the kings, a body of thirty); each member was required to be at least sixty years of age; and all held office for life. As a court of justice, the *Gerusia* had jurisdiction over the kings, over capital offences, and over cases of *atimia*, or attainder. As a legislature, its functions were in part sov-

[1] Schömann, p. 227.

ereign, in part *probouleutic:* it acted finally upon most state matters of importance, and prepared by preliminary decree the few measures which were to be submitted to the vote of the popular Assembly. It stands in character and functions half-way between the Athenian Senate of the Areopagus and the Athenian Senate of Four Hundred (secs. 76, 77).

102. **The Assembly.** — The Assembly consisted of all citizens (that is, all *Spartiatæ*) over thirty years of age. The matters which were referred to its vote were, disputed successions to the throne, the election of magistrates and *Gerontes* (Elders), war and peace, and treaties with foreign states. I have said only that these matters were referred 'to the vote' of the Assembly because they were not referred to its consideration. No place was given in the Assembly to real deliberation; only the kings, the Ephors, and the *Gerontes* could either make a motion or take part in debate. Indeed, debate was a thing hardly known in Sparta, where every man was taught to despise the talker and to admire the man whom later times were to dub the 'laconic' man. The utterances of the magistrates and senators in the Assembly were probably curt opinions packed into a few scant sentences. And the voting was as informal as the debating. A division was seldom resorted to; a *viva voce* vote decided.

103. **Election of Elders.** — Only in the election of *Gerontes* was a different and more elaborate procedure observed. Then, after the Assembly had convened, several persons selected for the purpose stationed themselves in a building near the place of assembling, from whence they could get no view of the Assembly, but where they could hear the voices of the assembled people. Upon the completion of this arrangement, the candidates for the *Gerusia* passed through the Assembly, in an order determined by a lot whose result was unknown to the listening committee near by, and the choice of the Assembly was ascertained by the decision of the concealed deputation as to which of the successive shouts of applause that had greeted the candidates as they made their appearance had been the most spontaneous and full-throated. This election by applause was, of course, just an elaborate form of *viva voce* voting.

104. **The Ephors.** — The most notable and powerful office known to the constitution of Sparta was the office of Ephor. It was an office, there is reason to believe, of great antiquity; but development had hurried it very rapidly away from its early form and character. The five Ephors (or Overseers, for such is the meaning of the title) were originally mere deputies of the kings, appointed to assist them in the performance of their judicial duties, to act as vice-regents in the absence of their royal principals, to supervise in the name of the kings the other magistrates of the state, to superintend, under the same authority, the public discipline, and to summon, by royal warrant, the *Gerusia* and the Assembly; in short, to serve in all things as the assistants of the kings. But gradually, through the operation of causes for the most part hidden from our view, but possibly in part because they sympathized more with the citizens from whose ranks they were yearly drawn than with the kings who appointed them, and in part because they were chosen by two kings not always harmonious in their counsels or purposes, and were thus kept away from sympathy with the royal administration as a whole, the ephors drew steadily away from the control of the kings, until at length their power was not only independent of the authority of the throne, but even superior to it. It was as if the Athenian king had appointed archons to assist him in various state functions, only to see them step by step overtop the throne itself and leave him only the name of king. There is no clear evidence that the choice of the five ephors passed at any time away from the kings; but the ephors certainly exchanged their character of representatives of the kings for that of representatives of the state and virtual masters of the kings, — overseers of the chief magistrates as well as of all others. The kings were obliged every month to take an oath to this supreme board of five to exercise their prerogatives according to the laws; the ephors, on their part, undertaking, on behalf of the people, that so long as this oath should be observed the

kings' power should pass unchallenged. Every nine years the ephors asked of the gods a sign from the heavens as to whether anything had been done amiss by the kings, and if the heavens revealed any sinister omen, the conduct of the kings was, upon the initiative of the ephors, investigated by the *Gerusia*. Private individuals, besides, could bring charges against the kings to the notice of the ephors, and it rested with them to dismiss the charges (to answer which they could summon the kings before them), or to push them in the *Gerusia*.

105. Of course, if masters of the kings, the ephors were masters of all others in the state also. They could interfere, with full power to investigate and to punish, in every department of the administration; the supervision of the public discipline, and consequently of the private life of every individual, rested with them as overseers of the special officers of the discipline; they could summon the *Gerusia* and the Assembly and lay before them any matters they chose; they were the treasurers of the state; in everything they were the supreme authority. The limitations of their power lay in the fact that they were a board of five men and could do nothing of importance except by a unanimous resolve, and that, their power lasting but a single year, they would presently become private citizens again, liable to accusation and punishment by their successors.

One of the board, like one of the Athenian archons, was Ephor *Eponymus*, giving his name to the civil year.

106. **The Administration of Justice.** — With reference to the administration of justice in Sparta we are not able to say much more than that the law was interpreted and applied by the kings in cases relating to the family, to inheritances, or to the redistribution of property by marriages between rich and poor (the kings being, so to say, Chancellors, and families wards in Chancery); that cases affecting the kings themselves

or involving the highest sort of crimes were heard by the *Gerusia;* and that all other cases were determined by the ephors or by lesser magistrates. There were no popular jury-courts.

107. **The State Discipline.** — But the feature of their constitution which chiefly preserved the supremacy of the *Spartiatæ* over the subject population of Helots and *Periœci*, and made Sparta Sparta in the eyes of the rest of the world, was the State Discipline. Every Spartan lived the life of a soldier in garrison. He did not belong to himself, but to the state. He was taken from his parents at seven years of age, and from that time until he was sixty lived altogether in public, under a drill of muscle, appetite, and manners such as not even a modern professional athlete could well imagine. From seven to thirty (thirty being the age of majority in Spartan law) he was schooled to endure the roughest fare, the scantiest clothing, the poorest lodging, and the completest subordination to his elders. After thirty he acquired certain political and social privileges: he was then a citizen, and he could marry; but even then he was permitted no essential change of life. He was expected to keep up his athletic habit of body, he must still eat at the public messes, could have no home life, but must see his wife only infrequently for a few minutes, or by stealth. He *must* marry, — the state required that of him, — and must consequently maintain a household. He must also contribute his share of money and supplies to the public messes (*Syssitia*). Only when he had passed his sixtieth year could he in any measure lead his own life or follow his own devices.

It was probably failure to comply with the requirements of this discipline or to contribute the required quotas to the *Syssitia*, that degraded *Spartiatæ* from 'Equals' to 'Inferiors' (sec. 99).

This discipline included the women only during their youth; girls had to 'take' gymnastics as the boys did; but they did

not go on into the discipline of the men. All education which we should account education was excluded from the system. Only music of a rude sort, the use of simple stringed instruments and a taste for the songs of war, softened the constant training of sense and sinew. The product was a fine soldiery and noble soldiers' mates, — shapely, sturdy women, and lithe, laconic men.

108. **Principle of Growth in the Spartan Constitution.** — The constitution of Sparta, for all it is so symmetrical, is not to be looked upon as a *creation*, any more than is that of Athens or of any other Hellenic city; and the mind must not be misled (by the fact that in describing it we are under the necessity of taking it at some one moment of complete crystallization) into supposing that such was exactly its form at every period of its history. It was, like every other constitution, a slowly developed organism. It early took a peculiar form, and long preserved it, because of the peculiar situation of the Spartans, who were few and had to hold their power against a hostile subject population greatly superior to them in numbers. They could not venture to relax for a moment their internal discipline; and so it happened that throughout the period during which history is most concerned with Sparta her constitution remained fixed in this single form. But afterwards it passed through the same stages of tyranny and democracy that had come to Athens so much earlier. The non-citizen classes eventually broke their way in large numbers into the constitution, and the Romans found Sparta not unlike the other cities of Greece.

109. **Lycurgus.** — The Spartans themselves, however, as I have said in a previous chapter (sec. 19), regarded their constitution as a creation, the creation of one man, Lycurgus (B.C. 820). To him was ascribed a rearrangement of the three tribes which constituted the state, a division of land between *Spartiatæ* and *Periœci*, the institution of the *Gerusia*, a provision that there should be monthly meetings of the Assembly, and, above all,

the creation of the celebrated system of state discipline; and it is probable that he was very largely instrumental in giving to the constitution the particular form in which we have seen it. But it is extremely improbable, if not intrinsically impossible, that he can have done much more in the way of effecting actual fundamental changes than did Solon or Clisthenes at Athens. The Spartan constitution had probably made no leaps or bounds; Lycurgus, doubtless, only guided its course at a very critical, because consciously formative, period.

Greek Administration.

110. We are without detailed information with regard to the methods and machinery of administration in the Greek cities. The little of universal applicability that we can say of the conduct of the government in the smaller particulars of the every-day application and execution of the law, is of a very general sort, which does not describe exactly the administration of any one city, but gives in bare outline functions performed, doubtless, by a multiplicity of officers in the larger cities, but in the smaller cities by only a few officers saddled with a multiplicity of duties. Aristotle gives us a list of the tasks commonly considered proper to administration in Greece, and it is chiefly upon this list that we must rely for a general view of the subject.[1] From it we learn that the governments of the Greek cities usually undertook the superintendence of trade and commerce, particularly within the city markets, the inspection of public buildings, "a police supervision over houses and streets," and the oversight of fields and forests; that they had receivers and treasurers of the public moneys, officers whose duty it was to draw up documents relating to legal business and judicial decisions, to hear complaints, and to issue warrants for the institution of legal processes, bailiffs,

[1] Schömann, p. 138; Aristotle, *Politics*.

jailers, etc. Besides these officials, there were the officers of the naval and military administration, at whose head stood such dignitaries as the Athenian Archon *Polemarchus* or the later Athenian *Strategoi;* the functionaries whose duty it was to audit the accounts and review the proceedings of those who handled the revenues of the state; and the superintendents of the public worship, — those officers who still in most cases bore the ancient royal title, long since banished from secular politics, but retained in the religious hierarchy in memory of a kingly function too much revered by men, and thought to be too much esteemed by the gods themselves, to be exercised by any save those who bore this oldest and most hallowed of titles (sec. 69).

In states like Sparta, where civil life was a rigorous discipline, there were, of course, special officers to superintend the training of the young and the conduct of the adult of both sexes. Sparta had, too, her public cooks to prepare the coarse diet of the *Syssitia*, and her superintendents of the public messes.

Hellas.

111. **Greece not Hellas.** — Although typical of much in larger Hellenic history, the political development of Athens and Sparta by no means sums up the political history of the Greeks. Athens and Sparta stand out conspicuous and regnant among the classical states of Greece; but European Greece was not the only home of the Greek peoples. It was not their chief home; it was not always even the pivotal centre of the world which they had made their own in the islands and the peninsulas of the Mediterranean. Far and wide outside of Central Greece lay the varied settlements which, together with the city states of the classical mainland, made up Greater Greece. The name Hellas, therefore, does not designate any particular country: it no more represents a geographical unit than does the term British Empire. Wherever Greeks established them-

selves in independence, setting up their own civilization and characteristic forms of government, there was a piece of Hellas; wherever there was an Hellenic people there was a portion of the Hellenic land. The Greeks never formed and maintained a common political organization, never knew national political union: 'Hellas,' therefore, has no organic or national significance. It means a region, not a nation.

112. **Original Migrations of the Greeks.** — The Greeks long consorted, as we have seen (secs. 35, 41), with their cousin Celts and Latins in the great movement of the Aryan peoples into Western Europe; but an eventual separation of these three branches of the single parent stock resulted in the widest divergences both of fortune and of character among them. The Celts pressed on into the body of the continent without contact with the sea; the Latins slowly penetrated by land into the spacious peninsula of Italy; but the Greeks tarried in the mountains of Phrygia, thence to issue forth to their contact with the Ægean and their association with the sea-faring Phœnicians. First, it would seem, they poured a numerous population over the Hellespont into Europe, a population which was to occupy in time, not only Greece proper and the Peloponnesus, but also all the coasts and islands of the Ægean. At a later time smaller companies, single tribes, issued forth to the conquest of special tracts of the inviting coasts of Asia Minor or followed the earlier emigrants into the peninsula. Thus the ancestors of the Ionians are said to have effected in that 'prehistoric' time their settlements upon the Asiatic shores of the Ægean; and the ancestors of the Dorians to have entered the mountain country of Northern Greece, whence at a later time the Dorian conquerors of the Peloponnesus were to sally forth to perform the first act of authentic Greek history (sec. 96).

113. **The Phœnician Influence.** — It was the Ionians, thus made neighbors to the great sea, who received for the Greeks the deep and lasting imprint of the Phœnician influence. The Phœnicians were then already old in civilization and in com-

mercial enterprise. They had been traders ever since the sixteenth century before Christ, and were elders among the nations of their time. It was of course inevitable that the unformed Greeks should learn from them as from masters. And they learned much. They probably learned from these first lords of the Mediterranean not only navigation and shipbuilding, but also the use of weights and measures, their alphabet, and much antique taste and knowledge in the fields of art and science. By the Ionians, probably, this eastern culture was communicated to European Greeks. Finally it became an integral part of Hellenic thought and habit, hardly to be distinguished as of foreign origin.

114. **Later Migrations of the European Greeks.** — The first settlements of the Greeks in the European peninsula to which they were to give their name were not their final settlements there. Later days witnessed many important readjustments. Thessalians entered the northern portions of the peninsula, to make it 'Thessaly,' driving the Æolians already settled there into new homes further south, in Bœotia; the Dorians made their great conquering movement southward into Peloponnesus, displacing there the Æolian Achæans, who, thus ousted, in their turn expelled an Ionian population from a narrow, sheltered strip of the Corinthian gulf coast, to which they gave its historic name, Achaia; and many of the Ionians, thus expelled from their early seats in Peloponnesus, passed northward to join their kinsmen in Attica. Thus was that distribution of races effected in Greece which was to characterize the classical period of Greek history.

115. **Resettlement of the Asiatic Coasts from Greece.** — But these movements of the races did not stop with the readjustments thus effected on the peninsula. Attica could not easily contain the Ionian immigration which came to her, so to say, from the hands of the Achæans. Many, therefore, passed on from Attica to found new Ionian settlements on the central Ægean coasts of Asia Minor. Yet earlier, bodies of

Achæans, still under the impulse, perhaps, which they had received from the Dorians, had gone from Achaia to occupy the northwest regions of the same Asiatic coast. Even the Dorians passed on into Asia from Peloponnesus, taking possession of the southwestern coasts of Asia Minor and establishing themselves in the islands of Crete, Cos, and Rhodes. The Dorians, indeed, had become supreme only in the southern and eastern portions of the Peloponnesus, only in Messenia, Laconia, and Argolis. The settlements in the southern islands of the Ægean archipelago and on the southwestern coasts of Asia Minor symmetrically completed their geographical position as a sort of southern fringe to classical Hellas.

It is, doubtless, to this period of the resettlement of Asia Minor by the European Greeks, thus returning upon the original lines of Greek movement, that we owe the legend of the Trojan war. Really kinsmen of the Trojans, the European Greeks went against this power of oldest Greece as against an alien and a strange people.

116. **The Greek Mediterranean.** — Nor was even this the last of movement and new settlement on the part of the restless Greeks. They were yet to add to a Greek Ægean a Greek Mediterranean. This they effected by means of the notable colonization of the eighth and seventh centuries before Christ. Foremost among the colonizers stood Ionian Miletus, in Asia Minor, and Ionian Chalcis, in Eubœa. Miletus became the mother of more than eighty colonies, sending companies of her people to found Naucratis on the Nile delta, Cyzicus and Sinope, and a score or two of other towns on the Propontis; making settlements further away still, where she did so much of her trading, on the shores of the Euxine. Chalcis contributed thriving Greek communities to Sicily, created the 'Chalcidici,' and founded Rhegium in Italy. Others were scarcely less busy in colonization. Spartans created the notable city of Tarentum, in Southern Italy; Achæans built upon the same coast the rival cities of Sybaris and Croton; Corinthians established Corcyra

off the coast of Epirus, and lusty Syracuse in Sicily. The Ionian Phocæans ventured still further west and built that Massalia which was to become French Marseilles. Massalia, in her turn, sent colonists to the eastern coasts of Spain; and these were kept back only by the power of Carthage, probably, from spreading wider still Greek settlement and dominion in the west. In brief, it was a distinguishing characteristic of the whole process by which the Mediterranean was at this time so largely Hellenized that towns begat towns in prolific generation. Each colony was sure to become itself a mother city. The process was of two centuries' duration, extending from about 750 B.C. to about 550 B.C. But so rapidly did it move, so much faster did the colonies develop in all respects than the mother cities of the central Greek lands, that in the first century after the beginning of the Olympiad reckoning (776–676 B.C.) the "centre of gravity of the Hellenic world" had already shifted from Greece proper to the lusty colonial states. In Cicero's phrase, an Hellenic hem was woven about the barbarian lands of the Mediterranean. From far eastern Naucratis, on the Nile, to far western Massalia, in Gaul, throughout almost all the chief islands of the sea, skirting the shores of Propontis and Euxine, as well as on every Mediterranean coast not dominated by Phœnicians, thronged busy Hellenic colonies, impressing everywhere upon the life of that early time their characteristic touch of energy, of ordered government, of bold and penetrating thought and courageous adventure, and everywhere keeping themselves separate, in proud distinctness, from the barbarian peoples round about them.

117. **Race Distribution.** — The distribution thus effected of the various branches of the Greek race is not without its historical interest. The Ægean is circled, east, north, west, and south, by Ionian settlements, only Thessaly and the Æolian colonies on the northwestern coast of Asia Minor breaking their continuity from Eubœa round by the Chalcidici and Thrace, down the eastern coast of the Ægean, through the islands of Samos, Icaria, Naxos, Paros, Tenos, and Andros, to Eubœa

again. South of this Ionian circle is the Dorian semicircle, which runs through Crete, Carpathus, and Rhodes to the islands and coasts of Southwestern Asia Minor. Italy is occupied, for the most part, by Æolian settlers, though a Dorian city stands at one end, an Ionian city at the other, of the line of Æolian colonies there. Sicily is shared by Dorians and Ionians.

Everywhere, however close they may live to each other, these several tribes retain their distinctness, conscious of kinship and using substantially the same speech, but persisting in noticeable differences of character and rivalries of aim.

118. **The Greek Colonial System.** — There was little or no political unity even among cities of the same division of the race. No common system of government bound the towns of any coast together; everywhere, on the contrary, they stood aloof from each other, organically separate and self-directive. Greek colonization was radically different from the colonization which the modern world has seen, and even from that which the Roman world saw. A mother city kept no hold upon her colonies whatever, except a very vague hold of religious sentiment which even very slight strains of adverse circumstance often sufficed to destroy. Colonies went out to become cities, in the full antique sense of that term, completely independent, self-governing communities, namely.

The mother city sent out each colonizing company that left her as if she were sending out a part of herself. The emigrants took with them fire kindled at the public hearth (*prytaneum*), wherewith to furnish their own altars with the sacred flame kept alive from of old in the religious rites of their kinsmen; the mother city supplied them with a leader whom the colonists recognized as their founder; the approval of the Delphic oracle was often sought by the emigrants, and they generally awaited, too, the consent of the city's gods. If, moreover, in after times, a colony contemplated sending out from its own midst another colony, it commonly sought a leader and founder at the hands of its own mother city. Many ties of sentiment and tradition bound it to the community from which

it had sprung. But none the less did it become, immediately upon its birth, a sovereignly separate state, no less its own mistress in all things than the city from which it had come out. The Mediterranean was fringed, not by a few Grecian states, aggregates of Æolian, Dorian, or Ionian settlements, but by scores of separate city communities as independent, for the most part, and often as proud, as Athens, — not unfrequently as powerful also as she.

119. **Colonial Constitutions.** — It was natural that each colony should retain in its political arrangements the main features of the constitution of its mother city; and in the earlier periods of colonization the Greek world may be said not to have known any political organization but the aristocratic, in which the elders of the older kinship dominated with assured, almost with unquestioned, authority. The earliest periods of colonization, it is true, were the periods of monarchy; but of monarchy already in decay. The aristocratic organization was, accordingly, at first, almost everywhere either produced or reproduced in the colonies. But it was destined from the nature of the case to undergo in these newer communities much more rapid changes than overtook it in the states of the older Hellenic lands. Among colonists settling in regions as yet untouched by their own civilization there necessarily obtained an equality of condition, and presently an absence of clear traditional authority, which made democracy grow as if it were a natural product of the soil, and of the new atmospheric conditions. Accordingly democracy was developed in the outlying parts very much sooner than in the central lands of Hellas. Athens waited till the end of the sixth century B.C. to see it in the reforms of Clisthenes (secs. 81–87); while many of the newer states had witnessed its introduction quite a century earlier.

120. Although they outran the mother cities of Central Greece, however, in their changes of constitution, the colonial cities generally went through just the same phases and stages

of change that were afterwards to characterize the revolutions and reforms of Athens which we have already examined. Democracy was generally approached through Timocracy, through arrangements, that is, such as Solon introduced in Athens, by which political privilege was graded according to wealth (secs. 73, 74). Often, too, changes of this nature were accompanied in the colonies, as in Rome (XII Tables) and in many of the central Greek communities, by a codification and publication of the law. Commonly, besides, democracies gave place to tyrannies, which were often, like that of Pisistratus in Athens (sec. 80), erected as a bulwark against aristocratic reaction. Either some man of the people pushed himself forward, by fair means or by foul, and checked aristocratic domination by reducing all alike to submission to his own power; or it was a member of the aristocratic class who made use of a favoring opportunity to destroy aristocracy by a concentration of authority in himself. In either case the tyranny answered a useful purpose. It generally compacted and facilitated resistance to outside aggressions upon the independence of the city; it usually advanced, by the maintenance of steadied civil order, the material interests of the community; it not infrequently bridged safely over the gulf which separated aristocratic privilege from popular sovereignty, preparing the levels of status upon which alone democracy could be firmly built.

121. **Law of Constitutional Modification in Hellas.** — We have, thus, the same forces of constitutional change everywhere operative in the Greek world; everywhere substantially the same changes take place in substantially the same order. Monarchy in all cases gives place to aristocracy; aristocracy very often shades off into timocracy; all exclusive privileges in the long run give way before the forces of democracy; but democracy is seldom secured its final triumph without the intervention of the tyrant, the man who rules without the warrant of the law. In some of the greater Hellenic cities the period of tyranny is the period of highest power and prosperity, and democracy comes afterwards only to mark decline and loss of separate independence.

Many Peloponnesian communities cling as long almost as Sparta herself to their aristocratic constitutions: in them class privilege dies exceeding hard. There is by no means a perfect uniformity in Hellas either in the speed or in the character of political change; but everywhere, unless outside circumstance commands otherwise, the same tendencies, the same leaven of plebeian discontent, the same ferment of personal ambition, are operative to work out within each little, self-centred city state, similar modifications of organization and authority.

122. **Union and Nationality among the Greeks.**—Despite the separateness of Greek city life and its jealous negation of all political power save only that of the citizens of each community acting independently and for themselves, there was a distinct consciousness in the minds of all Greeks alike of a common Hellenic blood, common traditions, a common religion and civilization. A sense of nationality which, though vague, was nevertheless persistent and on occasion decisive of great issues, pervaded the Hellenic cities of the ancient Mediterranean world and gave to the history of the Greeks some features of homogeneity and concert. A common Hellenic character everywhere distinguished Greek communities from all others. But their inbred political habit and their wide geographical extension effectually barred, sooner or later, every movement towards national governmental union.

123. **Religious Community: the Delphic Amphictyony.**—In religion more than in anything else the Greeks made show of union and gave evidence of a spirit of nationality. In many quarters of Hellas cities lying round about some famous shrine of Zeus, Apollo, Poseidon, or other national deity, came together into an Amphictyony, or League of Neighbors, for the purpose of worthily maintaining and enriching the worship of the divinity and of defending his shrines against pollution or dishonor. The most famous and influential of these associations was that which gathered about the shrine of Demeter Amphictyonis at Thermopylæ and the temple of Apollo at Delphi. It included, at one time or another, almost

all the tribes, small as well as great, of Central Greece, and in its later development admitted to membership Dorian states also of Peloponnesus. Its history runs back beyond the beginnings of authentic tradition; but it is probable that it had at one time considerable political influence. Its primary purpose was to superintend the common worship of Apollo, to guard the oracle at Delphi in its sacred independence, to maintain against invasion the territory round about the shrine which was consecrated to the uses of religion. It had regular assemblies composed of delegates from the several states in the league, a permanent official organization, fixed rules of procedure, an ancient prestige.

At the semi-annual meetings of the league, held spring and autumn both at Thermopylæ and at Delphi, vast concourses of Greeks swarmed from all parts of the central states of Hellas to take part in the festivals held in honor of the god, and to get gain out of the opportunities for trade thereby afforded.

But the equal voice accorded to large and small tribes alike in the votes of the Amphictyonic Council speedily robbed its conclusions of binding force in even the international politics of the states concerned. The powerful members of the Amphictyony naturally would not heed the dictation of its insignificant members. Rules there were by which each state in the league was bound under oath not to destroy any Amphictyonic town, not to turn away from it at any time its running waters, to join heartily in every duty which looked to the protection of the Delphic temple, and in other respects to observe, at least within the limits of the league, humane standards of conduct both in war and in peace and faithful standards of cooperation in all matters touching the worship of the divinity in whose name the association was formed. There were germs in the constitution of the Delphic Amphictyony on the one hand of national unity, and on the other of international comity and morality. But these germs were never developed.

The disintegrating forces of Greek politics were too strong to be stayed by the forces of religion.

The Amphictyonic bond was never, perhaps, a close one. During the central, most celebrated period of Hellenic history the influence of the league utterly disappears from politics; and, when in later times it again emerges, it is only to plunge Greece into "sacred wars" which afford Macedonia her opportunity for the destruction of Greek independence, and in the conduct of which almost every humane and religious purpose of the Amphictyony is flagrantly neglected.

124. **The Delphic Oracle: its Influence.** — None the less, the oracle at Delphi, whose shrine the Amphictyony had been organized to protect and honor, exercised an abiding influence upon Greek life throughout the length and breadth of Hellas. Its shrine has been called "the common hearth of Hellas," the centre towards which the faith and reverence of the great Greek family turned as towards the home of their religion, the symbol of their oneness. The Romans — even the Romans of the time of the Empire — consulted the oracle, so great was its fame and authority; and in the Greek world almost every considerable undertaking awaited its sanction. Its responses were generally, in cases of difficulty or of controversy between two powerful states, given with great wisdom and circumspection. Those who acted as the mouth-pieces of the god acquired a facility and felicity in the utterance of double, as well as of sage, meanings which saved the reputation of the oracle in all cases by virtue of a possible twofold interpretation of its response. Though the influence of the oracle waned, like all other influences of the older religion, in the later periods of Hellenic history, its power was very slow indeed to disappear altogether. Its formative authority must be put prominently forward in any estimate, however slight, of the nationalizing forces operative in the history of the Greeks.

125. **Political Aggregation: Achæan Supremacy.** — Such political cohesion as the cities of Hellas here and there had was given them, not by community of religious feeling, but by the compelling power of some dominating ruler or strong, aggressive city aristocracy. The story of the Trojan war supplies us with a type of the only sort of empire that Greek politics were ever to produce: the supremacy of one city over many others. Agamemnon, king of Mycenæ, was leader of

the Greeks against Troy because Mycenæ was the leading state of Greece. Mycenæ, lying inland in the northwestern portion of the great peninsula plain of Argolis, and Tiryns, placed just at the head of the Argolic Gulf, were the seats of the dominant forces of Greek politics in that antique time. Built, doubtless, by immigrants direct from Phrygia, they nevertheless figure in the Homeric songs as the regnant cities among the Achæans of the Peloponnesus. So controlling is the part played by Achæans in the Trojan expedition that Homer again and again uses 'Achæan' as synonymous with 'Greek.' Tribes from every quarter of the central Greek lands recognized the king of Mycenæ as their natural leader: for Mycenæ dominated Sparta, Argos, Corinth, and every other Peloponnesian community, and these Achæan communities of Peloponnesus were the prevalent powers of Greece.

126. **Cretan Power.** — Of a like pattern was the supremacy said to have been established in Crete by the mythical king and law-giver, Minos. At some time in that heroic period to whose events no definite dates can be assigned, Minos, ruler of Cnossus in Crete, was thought by the Greeks, not only to have brought within his power many of the other Hellenic cities of the island, but also to have constructed something like an empire out of the numerous island states of the southern Ægean, establishing a naval force which swept the sea of pirates, and giving to the cities under his sway a system of laws which was a prototype of the later and more famous laws of Sparta.

127. **The Supremacy of Argos.** — Later, Argos gained a like temporary ascendency in the Peloponnesus. Under Phidon, a lineal successor of the Heraclidæ, and therefore a rightful representative of Dorian supremacy, a man of imperative initiative and commanding ability, Argos dominated the cities of Argolis, and even led for a time the whole of the Peloponnesus. Phidon used his power to substitute Argos for Elis in the presidency, for a single occasion, of the Olympian games.

128. **Games and Festivals: the Hellenic Spirit.** — To preside at Olympia was to preside, for the nonce, over all Hellas:

for nowhere did the pan-Hellenic spirit speak with so plain and so impressive a voice as at Olympia. There every four years Greeks gathered from all quarters of the Hellenic world to hold games in honor of Zeus, their national deity. With equal frequency the Greek world sent its crowds of spectators, its picked athletes, its poets, historians, and musicians to the great Pythian festivals, in honor of Apollo, at Delphi. Every third year the Ionian Poseidon was celebrated with almost equal splendor in the Isthmian games, held under Corinth's presidency. Zeus had his famous games and rites every third year at Nemea also, in Argolis. But no festivals had quite the celebrity and influence enjoyed by those which every fifth year witnessed at Olympia, in Elis. The Greeks reckoned time by 'Olympiads,' by the four-year periods, that is, which elapsed between festival and festival at Olympia. To win a prize in the Olympian games was to win immortality. Thither poets went to publish their poems to all who would listen. Embassies came from every Greek city of consequence, on the mainland of Greece at any rate, to take solemn part in the ceremonies by which the religious motives of the gathering were proclaimed. Those who were not Greeks could be present as spectators; but no one who could not prove himself of pure Hellenic blood and free from all taint of sacrilegious crime could take part in any contest. The period of the games was made a period of peace, of truce: war stood still while the Greeks thus gave token of their common national spirit, of their race unity in religion and in standards of achievement. It is scarcely possible to exaggerate the influence, both political and moral, of these festivals. The persistency and enthusiasm with which they were celebrated throughout fully a thousand years gives impressive evidence of their significance in Greek national history.

Still, although they spoke a national spirit, they did not secure political unity. Nothing but strength, nothing but arms or self-interest, furnished means sufficient for even those tem-

porary, ephemeral unions of Greek cities which once and again seemed for a moment to be bringing sections at least of the Hellenic world into possession of better, because more national, political methods.

129. **The Delian Confederacy.**—The most celebrated, and in its early days most promising, of the combinations by means of which a certain degree of Hellenic union was secured was the Delian Confederacy. In resisting the Persian invasions of B.C. 490 and 480 the cities of European Greece had looked to Sparta as their leader. But the two campaigns resulted in bringing Athens forward as the most effectual representative of Greek independence; and the turn which the contest with the Persians took so soon as Marathon, Salamis, and Platæa had thrust the invaders out of Greece, made Athens the only possible leader. Immediately after these victories the Hellenic states of the Ægean joined the states of the mainland in following up the military advantages already gained and in driving the Persians back from Asiatic as well as from European Hellas; and in this movement, as in the earlier defence of the peninsula, Sparta led. But Sparta soon found that such leadership threatened to result in the breeding of generals whose personal power would be full of peril to her aristocratic constitution. She was, besides, not fitted, either by position or by political constitution, to play the part of a naval state: and yet it must be a naval state that should lead the Ægean and Asiatic communities in their contest with the common enemy. Sparta, therefore, withdrew, and Athens became her natural successor in the hegemony.

The result was the re-formation of the league; or, rather, the formation of a new league. This league was the Delian, formed about B.C. 475. It embraced most of the Ionian states of the archipelago and of the Asiatic coast. Delos was chosen as the seat of its treasury and the meeting-place of its assemblies, not only because of its convenient central location, but also because it possessed one of the most ancient and revered

shrines of Apollo and could therefore furnish for the league that religious background which was indispensable to Greek thought in the construction of confederacies. About the shrine in Delos the confederates gathered as an Amphictyony. Organization was effected under the wise and eminently conservative guidance of Aristides: and that organization promised to be effectual. The league had a treasury filled by stated contributions from all those members of the organization who could not themselves furnish men and vessels to the confederate fleet; that treasury was administered by permanent officials (*Hellenotamiæ*) trained for their functions in Athens; its assembly met statedly; it maintained a great fleet constantly upon the seas: in all respects it was the most compact, most energetic, most promising political combination that Hellas had yet seen.

130. **Athenian Empire.** — But the confederate features of this combination speedily disappeared. From the first Athens had had, not the presidency only, but also the control, of the league. Her citizens administered its treasury; she commanded the confederate fleet; both in material power and in political capacity she immeasurably excelled all the other confederates. Many of the confederate states, too, played into her hands. They preferred to pay money into the treasury rather than be at the trouble of supplying men and ships — and Athens made no objection to the change. Presently she transferred the funds to her own coffers, and did not scruple to use them to pay for the magnificent buildings and the matchless works of art with which, Pericles being master of her policy, she adorned herself. In every way, indeed, the money of the confederacy was made to simplify Athenian finance. When members of the league tried to withdraw from it, they found themselves coerced by Athens into remaining, being obliged either to pay a heavy tribute for their recalcitrancy or to submit to be ruled direct from Athens. The later days of the league saw Athenian officers of oversight established in many of the towns once equal members with

Athens in the confederacy, and in some Athenian garrisons. When necessary or expedient, Athens strengthened her control by new and separate treaties with the stronger towns under her hegemony. The Delian Confederacy had become an Athenian Empire.

It was the resources wrung from this empire that rendered the finances of Athens so easy of management in the time of Pericles; and it was the success of the finances, probably, which gained for his policy of making money payments to the people (sec. 90) the tolerance of the richer classes of the citizens, and prevented the fatal consequences of that policy from making themselves at once manifest.

131. **The Peloponnesian War: Oligarchies vs. Democracies.** — This empire had hardly been secured when Spartan jealousy brought about its downfall. The Peloponnesian war was fought nominally because Athens took Corcyra's part against Corinth, Corcyra's parent city, but really because the power of Athens had become too great to be longer brooked by the Peloponnesian states. Most of the more powerful states of the Peloponnesus, besides, had oligarchic or aristocratic constitutions, and Athens was the representative and embodiment of democracy. That Peloponnesus, with Sparta at its head, should strike at Athenian supremacy was inevitable.

The result of the war was to make Sparta supreme. But she used her supremacy to humiliate, not to unite, Greece. She put garrisons and military governors (*harmosts*) in every city convicted or suspected of disaffection towards her. It was impossible that Ægean Hellas should long be held together by the hateful methods of her drastic tyranny. Accordingly, Sparta steadily lost her ascendency.

Athens, on the other hand, gradually recovered much of the ground she had lost; gathered about herself a new and more extensive league, including not only many of her old allies, but also Dorian and Eubœan commonwealths not a few, and even, for a time, Macedonian and Thessalian princes; conducted her-

self with an unwonted moderation, dictated by sad experiences; and had the satisfaction of seeing Peloponnesian fleets again and again driven from the Ægean. Sparta was forced to be content to be the chief among oligarchies and to leave the principal rôle in Greece to democrats.

132. Meantime Thebes was brought to a sudden and short-lived supremacy by the genius of Epaminondas, utterly defeating the Spartans at Leuctra (B.C. 371) not only, but also making forcible and radical readjustments in the politics of the Peloponnesus.

133. **Macedon.** — But nothing that any Greek city could do proved effectual in uniting the Greeks: confederacies and hegemonies alike were ephemeral. It remained for Macedon and Rome to do for them what they could not do for themselves. The Macedonians were cousins to the Greeks, having much Hellenic blood in their veins, — though just how much we cannot say. They were quite near enough of kin to understand Greek character and politics thoroughly, and to make their assumption to lead Greece seem not altogether unnatural. Philip of Macedon knew his object perfectly, easily divined the means of attaining it, and advanced towards it with consummate craft, energy, and success. First, he conquered the outlying Greek cities nearest to his hand; next he intervened in a "sacred war" — a war among the Amphictyons concerning Delphi — by which Greece was torn, and won a place in the Amphictyony itself, as a Greek power; and then, turning to the completion of his designs, he crushed Athens (Chæronea, 338), reduced the power of Sparta, and, establishing himself in the presidency of the Amphictyony, brought the states of European Greece together into a nominal league which was in reality a Macedonian empire. Central Greece was at last compacted for a national undertaking, — the Hellenization of the East.

134. **The Hellenization of the East.** — That Hellenization followed the conquests of Alexander the Great. Alexander

moved against Persia as the leader and representative, because the master, of the European Greeks. His armies were Greek, in large part pure Greek, and the regions which he conquered were regions opened thereby to the Greeks. Alexander himself did not live long enough to do much more for the permanent alteration of eastern civilization than clear away obstacles to the spread and predominance of western arts and ideas, and create the highways of political organization upon which Greek influences were to advance into Syria and Egypt. The great changes which were to make the East Hellenic took place under his successors, the Diadochi, amidst the wars by which they sought to establish upon firm foundations their series of independent Græco-barbarian kingdoms. The process was easiest, of course, in Asia Minor, and most nearly resulted there in a veritable Hellenization; but even in Syria and Egypt it made notable strides, leaving Greek cities like Antioch and Alexandria to attest its vigor, and subduing to Greek influences much important Mediterranean coast country.

135. The East was by no means, however, made Greek in any such sense as that in which the Ægean coasts of Asia Minor had so long been Greek. The Greeks, though they became exceedingly numerous and easily dominant in the new kingdoms, did not anywhere, probably, constitute a majority of the population. Nor were they Greeks, for the most part, who would have been permitted to contend in the games at Olympia. Macedon's supremacy and eastern conquests had produced a new Greek race, with deep infusions of Macedonian and barbaric elements both in its blood and in its manners. It was on that very account the better adapted to establish a new civilization, which knew little of the old Greek liberty or variety, — an orientalized Greek civilization. It was not stiffly retentive of exclusive characteristics, like the pure Hellenic; it was receptive of outside influences, open to compromise, submissive to rulers.

136. The Macedonian kingdoms amalgamated the East and

gave it that individuality which, after Roman dominion had spread to it, was to enable it still to occupy a place apart in the Roman system, and was to cause it ultimately to emerge from that system a distinct, separate, self-sufficing whole, the Eastern Empire (secs. 186, 187).

When Constantine transferred the capital from Rome to Byzantium, he of course shifted the centre of gravity from the Latin-Teutonic to the Greek side of the Empire. In the time of Justinian Greek was the prevailing language and the chief imperial officials were Greeks.

137. The older Greek cities of the Ægean coast of Asia Minor had been prepared by their earlier history to fall easily into a system like that established by Macedon. Denying themselves the strength that lies in union, they had singly succumbed, first to semi-barbarian Lydia, and afterwards to wholly barbarian Persia. It was no new thing with them, as it was with Athens and Thebes and Sparta, to become material in the hands of a conqueror, constituent parts of an empire.

138. **The Achæan League.** — The period of Macedonian supremacy, period though it was of the final decline of Greek liberty, nevertheless witnessed one of the most brilliant attempts at national action on the part of the Greeks. The Achæans, who ever since that heroic age of the Trojan expedition when they had been leaders of all Greece (sec. 125) had stood in the background of Hellenic history, working out their own quiet developments in comparative peace and prosperity in secluded Achaia, now again, in the closing age of Greek history, stepped forward to a new leadership and initiative. The cities of Achaia had from time immemorial acted together under some form of political association; but their union did not become significant in the history of Greek politics until the year B.C. 280. In that and the previous year several Achæan towns took heart to cast out their Macedonian masters, and, having liberated themselves, drew together for mutual assistance, making a common cause of their liberty.

The spirit of other towns kindled at the example, and the movement spread. Presently all the Achæan towns had become free, and the league sprang into importance. Sicyon, which was not an Achæan town, threw in her lot with it and gave it, in the person of her own gallant Aratus, a leader who was speedily to make it famous and powerful. Under his leadership it became instrumental in delivering Corinth and other neighbors from their tyrants. Year by year saw fresh accessions to its membership till it included Megara, Trœzen, Epidaurus, Megalopolis, and even Argos. For half a century it served as an admirable organ for the national spirit of the Greeks; for a full century it retained no small degree of credit; but finally, of course, it was drawn, like all else, into the vortex of Roman conquest. It may be said to have been the last word of Greek politics.

139. And in its constitution it spoke a rather notable word for the politician. That constitution brought the world within sight, perhaps, of a workable confederate arrangement. The league acted through an assembly which met twice every year and to which was entrusted, not only the election of all confederate officials, but also the supreme direction of every affair which affected the foreign relations of any city in the league, even though it were an affair not of general but only of local interest. The business of the assembly was prepared by a Council (*βουλή, boulē*) which was probably permanent. Its officers were, at first two Generals (*strategoi*), afterwards one general and a chief of cavalry known as *Hipparchus*, as well as certain subordinate general officers; a Public Secretary (*γραμματεύς, grammateus*); and a permanent executive committee of ten known as *Demiurgi*. The board of executive officers, it is believed, presided over the sessions of the Assembly.

Here, certainly, was a better framework than the Greeks had ever known before for concerted national action. Its chief defects lay in the composition and procedure of the

Assembly. That body was composed, in theory, of every freeman of the cities of the league who had reached the age of thirty years. In fact, of course, it consisted of the whole body of the freemen of the town where it met (usually Ægium, or, in later days, Corinth) and of such citizens of the other towns as had the leisure or the means to attend. The ancient world knew nothing of the device of representation which has solved so many problems of political organization for the Teuton. And the votes in the Assembly were taken by towns, not decided by the major voice of the freemen present. The few chance attendants from some distant city within the league spoke authoritatively for their fellow-townsmen: the smallest delegation had an equal vote with the largest; and yet there was no fixed plan which would make the vote of one delegation as representative as that of another.

140. **The Ætolian League.** — The same period saw another league spring into rivalry with Macedonia on the one hand and with the Achæan towns on the other, whose constitution bears so close a resemblance to that of the Achæan confederation as to suggest the prevalence in Greece of common conceptions, or at least of common habits, of political association. The Ætolian League, like the Achæan, had its general assembly of freemen; the business of that assembly was prepared by a committee whose functions resemble those of the Achæan Council; the chief executive officer of the league was a *Strategus;* his associate in command was dubbed *Hipparchus;* and a Public Secretary (*grammateus*) served the league in its formal transactions.

141. But these likenesses ought not to be too much insisted upon. We know less of the actual confederate life of the Ætolian League than of that of the Achæan, and what we do know reveals certain important differences between the two associations. The Ætolian League was not a confederation of cities, but a confederation of tribes. Nor was the leadership which the Ætolians acquired through their league like the

leadership which fell to the Achæan towns. The Ætolians inhabited a country backed by impenetrable mountain fastnesses to which they could retire, to the defeat of all outside coercion. Their aggressive and lawless natures led them to make of their neighborhood to the sea an opportunity for wide and successful piracy. Their power and their energetic initiative created for them a sort of empire: at one time all of Southern Epirus, Western Acarnania, Thessaly, Locris, Phocis, and Bœotia were included in the league, and it even had allies in Asia Minor and on the Propontis. It "assumed entire control of the Delphic oracle and of the Amphictyonic assembly." Its leadership was a purely military leadership, presenting salient points of contrast to the association by means of which the Achæan Confederates sought to secure themselves in the enjoyment of their liberties.

Every freeman of thirty years of age was entitled to membership of the Assembly of the League. That assembly met, not twice, but once a year, in the autumn, at Thermum, and was attended, of course, only by those who could afford to attend: that is, by the dominant few.

The Assembly did not select the *Strategus* of the League, but a list of nominees for the office — from which a Strategus was picked out by lot.

The Strategus, not a board of magistrates as in Achaia, presided over the meetings of the Confederate Assembly; and to him were entrusted, besides his military, certain general civil and representative functions.

The Ætolian, like the Achæan League, was eventually, of course, swept into the Roman vortex.

142. **Rome and the Western Greeks.** — Western Hellas, after having been at some points touched by Carthage, had been absorbed by Rome, of course, before the imperial city had sent her armies to intervene in the factional fights of Greece proper. The cities of Magna Græcia Rome acquired when she completed her conquest of the Italian peninsula, B.C. 272. Sicily, with its Greek and Carthaginian settlements, she acquired in B.C. 241, and organized as a province in B.C. 227. The other western homes of the Greeks she made her own along with Spain and the coasts of Gaul.

143. **After Roman Conquest.** — Rome neither undid the work of the Macedonian princes in Asia Minor and Syria, nor

thoroughly Romanized there the systems of government. The vitality and self-direction of the semi-Greek municipalities of the East in large measure weathered Roman rule, as did also the Greek speech and partially Hellenized life of Asia, Syria, and Egypt. The compound of oriental, Greek, and Roman methods in government which was effected by the later emperors, when Greek Byzantium had become the imperial capital, Constantinople, may be best discussed in direct connection with Roman political development (secs. 181–187).

The Greek settlements of Sicily, Italy, Gaul, and Spain were much more completely swallowed and assimilated by Roman organization.

(II.) The Government of Rome.

144. **The Ancient Roman Kingdom.** — At no period before that of the Empire was the government of Rome radically unlike the governments of Greece; in their earliest stages the resemblance between Grecian and Roman governments was a resemblance of details as well as of general pattern. Homer's account of the patriarchal presidencies of Greece may serve as a sufficiently accurate picture of the primitive Roman monarchy. Kingship, it is true, seems to have been much less strictly hereditary in Rome than in Greece: the Roman kings were not only of several families, but even, tradition says, of different nationalities. The functions of the Roman kings, however, and the government over which they presided, would have seemed most natural and regular to a contemporary Greek observer. The king was high-priest of the nation, its general, and its judge. He was associated with a council, — a Senate, — composed of heads of families; for the Roman state, like the Greek, was a confederation of *gentes*, *curies*, and tribes; and the decisions of king and council were heard by a general assembly (*comitia*) of the freemen of the curies. There is nothing in all this to call for new comment; we have seen it

all in Greece (secs. 48–57), — except the method of succession to the throne. Upon the death of a king, a council of all the Fathers of the *gentes* chose an *interrex*, who was to hold office for one day; the *interrex* named a successor, the successor, taking counsel with the Fathers, named a king; and the *Comitia* confirmed the choice.

145. **Leading Peculiarity of Roman Constitutional Development.** — This primitive constitution completed its resemblance to those of Greece, by beginning very early to fall to pieces. But the way Rome took to alter her institutions was in some respects peculiarly Roman. The Romans never looked revolution straight in the face and acknowledged it to be revolution. They pared their constitution down, or grafted upon it, so that no change was sudden, but all alteration apparently mere normal growth, induced by thoughtful husbandry, and they could fancy that the original trunk was still standing, full of its first sap. No one was ever given leave to reform the constitution like a Solon or a Clisthenes. Reforms, however, were planted in the seed at various times which we can distinguish now very clearly as beginnings of sluggish changes which were to be entirely accomplished only in the fulness of time.

146. **Reforms of Servius.** — Thus a change such as Solon brought about in Athens was prepared in Rome by the military and civil policy of Servius Tullius, one of the latest and greatest kings of the ancient city. The Roman Senate in its youth resembled in one particular the English House of Lords as it was long ago (sec. 659) : it consisted of such leaders of the nation as were summoned by the king, and Servius stretched his prerogative by summoning to it the heads of certain plebeian families of consideration. Here was a notable breach made in patrician privilege; but made under the forms of the constitution and destined to bear fruit but slowly. More significant was the organization which Servius, still acting within constitutional warrant, this time as commander-in-

chief, gave to the army. For the purposes of military administration he divided the people into five property classes, to each of which were assigned military duties, proportioned to the means available to it for self-equipment for the field; and the host thus made up and classified he formed into an Assembly of Centuries (*Comitia Centuriata*). This assembly was simply the army in council. In it each of the hundreds (*centuries*) into which the army was divided had one vote. All matters of foreign policy in which the army as such might naturally be most interested to have a voice were submitted to this Army Council. Such prerogatives given to the new property classes contained promise of grave constitutional changes. The centuriate assembly outlasted the necessarily temporary army organization for whose sake it had been devised, came to be simply a body representing wealth instead of birth, and gradually absorbed an electoral and legislative power such as had never been dreamed of in the plans of Servius. Of this we shall see something later (secs. 154–155).

147. **The Centuries.** — The classification of the people effected by Servius was based upon a census of property which reminds of the political reforms of Solon in Athens (sec. 73). Like Clisthenes, however, Servius added a new division into tribes (sec. 82), and his property classes were not four but five in number. Every one who was subject to military service, and who owned not less than two *jugera* (a little more than an acre) of land, was to contribute to the defence of the state under the new classification: and the new classes were to be disposed into four tribes. The first class, consisting of those worth 100,000 *asses* ($2000), was to contribute eighty centuries of footmen and eighteen centuries of horsemen to the army; the second, third, and fourth classes, representing respectively individual properties worth 75,000, 50,000, and 25,000 *asses*, were each to supply twenty centuries of infantry; and the fifth class, representing a census of 11,000 *asses*, was to furnish thirty. One-half of the centuries of footmen supplied by each class consisted of seniors, men from forty-five to sixty; while the other centuries were made up of men of from seventeen to forty-five.

In the *Comitia Centuriata* the voting was done by centuries, the vote of each century being decided upon by a majority vote within the century.

Evidently the result of the arrangement taken as a whole was to give preponderance in the conclusions of the *Comitia* to wealth and age.

There were added to these centuries of the classes one century drawn from those who were shown by the census to have less than 11,000 *asses;* and four centuries of musicians and workmen drawn from the masses not reckoned in the census at all. The total number of centuries was, therefore, one hundred and ninety-three.

148. **Beginnings of the Republic.** — The line of Roman kings came to an end, and the Republic was inaugurated at almost the very moment when Clisthenes was effecting his popular reforms in the institutions of Athens. But it ought to be kept clearly in mind that a republic was inaugurated in Rome in 509 B.C., not in an Athenian or modern, but only in a Roman, sense. As I have said, the Romans never made revolutions out of hand; they only grew them, from very slowly germinating seed. The change made in 509 was scarcely greater than was the change effected in Athens some two centuries earlier by substituting annual archons for life archons. Two Consuls, to be chosen annually by the *Comitia Centuriata*, were substituted for the kings, who had grown insolent in the person of Tarquin; and a newly created high-priest, dubbed *Rex Sacrorum*, received the religious prerogatives of supplanted royalty — that was all. The regal functions quietly passed to the joint exercise of the consuls, and the right of electing to the chief magistracy passed away from those who had elected the kings. In all other respects the constitution kept close to the lines of its original forms; only the Senate receiving increase of power.

149. **The Senate.** — The Roman Senate is singular among bodies of its own kind in having had no clearly defined province. From the time when consuls were first chosen till the end of the second Punic war (B.C. 509–201) it was virtually, so far as the conception of policy went, the government of Rome. Its counsels determined the whole action of the state. But not by any very tangible legal right. It remained till the

last what it had been from the first, — only a consultative body whose advice any magistrate might ask, but whose advice no magistrate was bound to take unless he chose. It was associated with the consuls as it had been with the kings, — to give them such counsel as they should call upon it to give. Its powers were, strictly speaking, only the residuum of powers not delegated by law or fixed custom to any magistrate or body created since the days when all legislative functions had belonged to the Senate as of course, as the only council in existence. Until the comparatively late times when the Senate had been corrupted by the temptations incident to the administration of a vast empire, and had proved itself as incapable as any other advisory debating club of managing foreign conquests, it had many distinct advantages over any other authority that might have felt inclined to compete with it. Magistrates held their offices only for one year, and were generally drawn from the classes strongest in the Senate; the various assemblies of the people (secs. 154, 155) had no permanent organization, and met only occasionally, when the proper magistrate saw fit to summon them; the Senate alone had continuous life and effective readiness for action. With its life-membership it was immortal; containing the first statesmen, lawyers, and soldiers of the state, it had a knowledge of affairs and traditions of authority, of achievement, and of sustained and concerted purpose such as magistrates who held their offices but for a twelvemonth, and meetings of the people which came together but for a day, could not possibly have. It was compact, practised, clear of aim, resolved, confident. The vagueness of its functions was, therefore, an advantage rather than a drawback to it. It undertook every task that others seemed disposed to neglect; it stretched out its hand and appropriated every function that was lying idle. If its right to any particular function was seriously challenged, it could quietly disclaim it, — to take it up again when the challenger had passed on. The consuls and other magistrates could ignore its deter-

minations at will and follow their own independent purposes or the wishes of the popular assemblies. The Senate was only their servant, to speak when bidden. But the Senate's advice was commonly indispensable; nowhere else were such coherent views or such informed purposes to be found, nowhere else so much experience, wealth, influence. It was too serviceable to be decisively quarrelled with: and in all seasons of quiet in home affairs it accordingly had its own way with undisturbed regularity.

150. **Composition of the Senate.** — The number of senators was, throughout most of Roman history, limited to three hundred. Their tenure was for life, provided they were not deprived of their rank by the censor. In the regal period they were chosen by the king, his summons constituting them members (sec. 146); and when consuls succeeded to the kingly functions, they, like the kings, filled vacancies in the Senate. A law of about B.C. 351, however, gave the right to a seat in the Senate to every one who had been consul, prætor, or curule-ædile; and vacancies over and above the number which such ex-officials sufficed to fill, were thereafter filled by appointment of the censor.

151. **Roman Conquests and their Constitutional Effects.** — While the Senate, however, was thus profiting by knowing its own mind and by having functions too indefinite to be curtailed, the conquests of the Roman armies, which the Senate at first did so much to advance by supplying both wise plans and effective leaders, were sweeping together an empire whose government was to prove an impossible task even for the Senate, — for any magistrate or assembly, indeed, known to the constitution of the city-republic. Rome was denied the exclusively municipal life for which her forms of government fitted her and which was permitted to Athens, Sparta, and the other cities snugly ensconced in their little valley nests among the mountains of Greece. She had no pent-up *Attica* in which to live a separate life. There were rival towns all about her on the plains of Latium and beyond the Tiber in Etruria. When they had been brought under her supremacy, she had but

gained new hostile neighbors, to whom her territory was equally open. She seemed compelled for the sake of her own peace to conquer all of Italy. Italy subdued, she found herself separated by only a narrow strait from Sicily. Drawn into that tempting island by policy and ambition, she came face to face with the power of Carthage. In subduing Carthage she was led to occupy Spain. She had been caught in a tremendous drift of compelling fortune. Not until she had circled the Mediterranean with her conquests, and had sent her armies deep into the three continents that touch its international waters, did she pause in the momentous undertaking of bringing the whole world to the feet of a single city. And her constitutional life itself felt every stroke of these conquests. This constant stress of war was of the deepest consequence to her politics, — especially in enabling the plebeians to break into the pale of political privilege much earlier than they might otherwise have done so.

152. **The Plebeians.** — Strangely enough, it is not easy to say just who the plebeians were. Some historians believe that they were a non-citizen class such as we have seen in the *metœci* at Athens (sec. 93); others have satisfied themselves that they were at least sub-citizens, members even of the exclusive *curies* which contained the original Roman *gentes*, but that somehow they were not themselves within the patrician *gentes*, and, consequently, not of the classes which were eligible for office. Possibly neither view is either quite right or quite wrong. Whether or not it be true that Rome, because seated in a district which was neither fertile nor healthful enough to have been chosen for any other purpose, was at first an asylum for the outlawed and desperate characters of Italy, it is reasonably certain that her population had from the beginning a very miscellaneous, heterogeneous composition. Possibly the *gentes* which claimed to be the only *gentes* that had fathers (*patres*, in other words, long and honorable descent), and consequently the only *patricians*, were themselves of rather artificial make-

up; and it is quite conceivable that those who came later into the Roman circle, although not less naturally but only more recently formed into families of the orthodox pattern, were relegated to a rank of inferior dignity in the state, even if not excluded from a place in the *curies* alongside of the patricians. But there were also many, doubtless, who had come to Rome as aliens, content at first to live there as outsiders for the sake of certain advantages of trade to be had only on the banks of the Tiber, and who had in time given birth to a non-citizen class, which had forgotten its alien extraction and had become identified with the city, but which had made no advance beyond the threshold of the state. Probably these, too, were *plebeians*. Doubtless the same name included also those who, whether sub-citizens or non-citizens, had attached themselves to noble patrons in the half-servile capacity of clients.

153. **Secession of the Plebeians** (B.C. 494). — Whoever the plebeians may have been, they were indispensable to Rome in her struggle for supremacy. They came year by year into a greater military importance, constituting more and more exclusively the rank and file of the Roman armies: and they employed their usefulness to the state as a lever by which to raise themselves to complete political equality with the senatorial families. Their first decisive step demonstrated their strength, — to themselves, possibly, as well as to the patricians. In the midst of war, and with their arms in their hands, they seceded from the city and threatened to establish a separate government of their own. Their grievance was, that they were at the mercy of the patrician magistrates: they had not as yet any greater demands upon which to insist seriously than protection against magisterial tyranny.

154. **The Tribunes.** — They were heeded, of course. A seed of revolution was sown, as usual, without any one's seeing the promise of innovation it contained. *Tribunes* of the people were appointed: at first two, afterwards five, in the last days ten. They were officers chosen from the ranks of the plebeians

and invested with the right to suspend the judgment of any magistrate upon a plebeian by peremptory veto. The persons of the tribunes were made inviolable by a compact (the *lex sacrata*) between patricians and plebeians which denounced a curse upon any one who should interfere with them in the discharge of their functions. The concession seemed a small one, — especially in view of the fact that the tribunes, though plebeians, were (till B.C. 471) elected, not by their own order, but by the *Comitia Curiata*, the exclusive assembly of the patrician *curies*. But the creation of the tribunate did, nevertheless, transform the constitution. The tribunes did not content themselves with restraining the tyranny of the magistrates; they constituted themselves the political leaders of the *plebs;* they called plebeian meetings (*concilia plebis*) which they harangued, and which they prompted to take concerted action for the enforcement of plebeian rights. It was of no avail that the patricians violently broke in upon and dispersed these meetings and handled the tribunes roughly. Plebeian agitation extorted a law (the *Icilian*, B.C. 493) which visited with the extreme penalty of death any interruption of a tribune while addressing the people.

155. **Progress of Plebeian Predominance.** — In B.C. 471 the election of tribunes was transferred by law to a newly constituted plebeian assembly of tribes, which was known as the *Concilium tributum plebis*. Step by step the resolutions of the strictly popular assemblies grew in importance. Ultimately a *Comitia Tributa*, an assembly in which all the people, whether patricians or plebeians, participated, became the chief legislative body of the state; the initiative of the tribunes in its counsels grew into a right of initiative in the proceedings of the Senate, their authority to check magistrates, into powers of independent judicial action. The *Comitia Curiata* still survived and exercised a small residuum of function, — for the Romans never willingly abolished a superseded institution; the *Comitia Centuriata* continued to elect and legislate on a reduced scale;

and the Senate still got its administrative suggestions heeded when it could, as of old; but the *Comitia Tributa* had virtually absorbed the sovereignty. It was the assembly of the whole people; the others were weakened houses of lords.

156. **The Plebeians and the Magistracies.** — The plebeians were not satisfied, however, with a growth of legislative power and the intervention of the tribunes between themselves and the magistrates. They were not slow to use their waxing political strength to open the magistracies to their order. With a true instinct for strategy, they attacked first the consulship itself; they would gain all by gaining that. But the fight was a long and stubborn one about this stronghold; the consulship was the key to the constitution, and the patricians contrived to delay the complete triumph of the plebeians in their attack upon it for a century and a half. The method of resistance which they adopted was at once astute, bold, and successful. As the plebeians approached complete possession of the coveted office, the patricians steadily curtailed its importance by paring away its prerogatives and giving them to officers newly created for the purpose and kept carefully within the patrician ranks. At the beginning of the contest, when it first became evident that the plebeian right to high office must be recognized, the plebeians were offered consular powers in the field under the title of 'military tribunes.' The tribunician veto had not hitherto been able to protect plebeians outside the city, and the powers which the consuls exercised despotically in the field were those of which the plebeians were most jealous. Still the gift of a share in these extraordinary powers under a new title did not satisfy the commons. They must be admitted to the consulship itself, with its dignities and its powers both in the field and at home. The law was, therefore, made to concede that a plebeian *might* be one of the consuls; but patrician influence and intrigue of course took care that none should be, for the choice was made by the *Comitia Centuriata;* and, for fear some plebeian might somehow creep in,

the office of *Quæstor* was created, and the consular privilege of acting as treasurer of the state was given into the hands of two patrician quæstors. The plebeians of course saw that they had suffered a virtual defeat, and pushed on. It was presently enacted that one of the consuls *must* be a plebeian; and the law was carried into effect. A subsequent law threw both consulships open to the commons. But both times the patricians answered by cutting off a piece of the consular power and keeping that piece still safely in their own possession. First, *Censors* were appointed to exercise the important prerogative, hitherto appertaining to the consular office, of taking the census and revising the roll of the Senate; and then *Prætors* were created and vested with the judicial functions which the consuls had inherited from the kings. Both these offices were denied to plebeian candidates.

'Praetor' was the original title of the officers afterwards called consuls. It was now revived for another office.

The hierarchy of office was growing, and the patricians were maintaining in large part their exclusive hold upon power; but the most that the privileged classes were gaining was delay. Eventually the door to every office, even to the sacred priesthoods and to the augural college, swung open to the *plebs*, and the old-time hateful inequality between patricians and plebeians was swept utterly away.

157. **Breakdown of the Republic.** — But the struggle between the orders was scarcely over before the approaching decline of the Republic had begun to become manifest. Rome had been attempting the impossible task of administering a vast empire by means of a city constitution, and her whole political system was breaking down under the strain. As province after province had come under her dominion, she had invented no new system whereby to give them good government and at the same time preserve for herself secure control. The Romans never invented anything new; they simply adapted old forms

and institutions as best they might to new needs and circumstances. They had, therefore, merely stretched the tentacles of their city constitution out over the world, and that constitution showed yearly clearer and clearer signs of being about to be torn asunder by the strain.

158. **Provincial Administration.** — The consuls and prætors of the city government were continued, as pro-consuls and pro-prætors, and sent out to govern provinces. But, once away from the supervision of the tribunes and the criticism of assemblies and Senate, they were absolutely irresponsible: save only that they were liable to trial for malfeasance in office, after the expiration of their terms of service, by jury-courts at Rome, which were of course out of sympathy with provincials and notoriously open to be bribed. In the city itself consul and prætor were theoretically independent of the conclusions of Senate or people; out of the city, commissioned as pro-consuls or pro-prætors, they were actually independent. They were city officers far away from home and from all city oversight, among subjects instead of among fellow-citizens. In Rome justice was administered by the magistrate, always subject to appeal in all cases which were not in the first instance heard in jury-courts, and well-known law governed all decisions. But in his province the pro-magistrate was a final judge restrained by no law but his own edict, issued on entering upon his provincial command, and by so much of the rules observed by his predecessor as he had chosen to adopt in that edict. And so throughout provincial administration. There being no way of collecting taxes in the province by means of any stretched municipal instrumentality, the taxes were farmed out to publicans. There being no way known to Roman municipal method of bringing local government in the provinces into any sort of systematic co-operation with the general administration, towns and districts were often suffered to retain their own local organization, but subject to the constant harassment of Roman interference. Force cured the

want of system; arrogant domination served instead of adequate machinery; a genius for intrigue and for open subjugation took the place of wise legislation. The world was made use of rather than administered.

159. **Causes of Failure.** — This attempt to make a city constitution serve for the government of a whole empire failed, therefore, for the double reason that it was impossible to provide masters for the magistrates who had gone out nominally as servants of the city without giving the provincials a share in the government, and impossible to give the provincials part in a system which knew nothing of representative assemblies, and consequently nothing of citizenship save in the shape of privileges which could be exercised only in Rome itself. The provinces could not be invited to Rome to vote and sit in the assemblies and the jury-courts. And it was not citizenship in Rome that the provincials wanted, but Roman citizenship in the provinces, if such a thing could be invented, with power to curb magistrates and condemn publicans on the spot.

160. **Establishment of the Empire.** — The only remedy possible to the ancient world was to overthrow the city constitution and bring Rome to the same level with the provinces by giving her and them a common master who could unify administration and oversee it with an equal interest in the prosperity of all parts of a consolidated domain. That is what Cæsar attempted, and what the overthrow of the Republic and the establishment of the Empire accomplished. Under the consuls and the Senate the provinces had been administered as Rome's property, as the estate of the Roman people; under the emperors, who combined in their single persons consular and pro-consular, prætorian and pro-prætorian, tribunician and quæstorian powers, the provinces very soon came to be administered as integral parts of Rome. The Senate still stood, and many provincial officers were still formally elected by the people of the city; but the city became, scarcely less than the provinces, bound to perfect obedience to the emperor; provin-

cial officers, and even city officers, were recognized as only his deputies; the Empire was unified and provincials brought up to an equality with their former masters by a servitude common to all. Caracalla's act of universal enfranchisement, whatever its immediate purpose (A.D. 212), was a logical outcome of the imperial system. All were citizens where all were subjects.

Evolutions of Government under the Empire.

161. **Genesis of the Empire.** — It is not possible to understand either the processes or the significance of the establishment of the Empire, without first understanding also the discipline of disorder and revolution by which Rome was prepared for the change from republican to imperial forms of government. The Empire was not suddenly erected. The slow and stubborn habit of the Roman, degenerate though he had become by reason of the dissipations of conquest and the growth of military spirit, would not have brooked any sudden change. That habit yielded only to influences of almost one hundred and fifty years standing; the changes which transmuted the Republic into the Empire began with the agrarian legislation of Tiberius Gracchus, B.C. 133, and can hardly be said to have been completed until the death of Augustus, A.D. 14.

162. **Tiberius Gracchus to Augustus.** — The first stages of the change which was to produce the Empire had, indeed, preceded the time of the Gracchan legislation. The strength of the Republic had lain in the body of free, well-to-do citizens, in a race of free peasants as well as of patriotic patricians, in a yeomanry of small farmers rather than in a nobility of great land-holders. But the growth of the Roman dominion had radically altered all the conditions of Rome's economic life. She had not only spent the lives of her yeomen in foreign wars, but had also allowed them to be displaced at home by

the accumulation of vast estates in the hands of the rich and by the introduction of slave labor. The small farm was swallowed up in the great estates about it; the free laborer disappeared in the presence of the cheap slaves poured in upon Italy as the human spoils of foreign conquest. Presently the cheap and abundant grain of the provinces, too, rendered agriculture unprofitable in Italy, and even farming on a vast scale by means of slave labor ceased: the great estates were converted into pastures for the rearing of flocks and herds. The pressure of these changes upon the peasant classes was somewhat relieved from time to time by the establishment of colonies in various parts of Italy upon lands acquired by the state by conquest; but such relief was only temporary. When Carthage was finally overthrown and the greater strains of war removed from Rome, the economic ruin of the home state became painfully evident, the necessity for reform painfully pressing. The poor who were also free had no means of subsistence: all the lands once owned by the state were in the hands of the rich, and with the rich rested all the substance of power, for they filled the Senate, and there made their riches tell upon public policy. The indispensable economic foundations of republicanism had crumbled utterly away.

163. It was this state of affairs that Tiberius Gracchus essayed to remedy, by reviving the laws (the Licinian of B.C. 366) in violation of which the rich senatorial families had absorbed the public lands. By enactments which he proposed as Tribune in 133 B.C., the public lands illegally occupied were reclaimed for distribution by a retroactive enforcement of the old limitations as to the amount of public land which each person should be allowed to hold, and, although the senatorial party accomplished the murder of Tiberius and the temporary defeat of his party, his measures were in large part put into operation, in deference to the clamors and demands of the people. Ten years later Tiberius' younger brother, Gajus Gracchus, received the tribunate and vigorously renewed

the same policy. He forced to enactment laws providing for the sale of grain at low prices to the people, for the establishment of colonies outside of Italy in the provinces, for the admission of certain classes of the citizens outside the Senate to a participation in the judicial functions then being monopolized by the senatorial oligarchs, and for a new method of bestowing provincial commands. But once more the oligarchy crushed its enemies and regained its *de facto* ascendency in the state.

164. It was the rule of the oligarchy which produced Marius and Sulla and the cruel civil wars between the respective parties of these rival leaders. Both parties alike threw, now and again, a sop to the commons, but neither seriously undertook any reform of the evils which were sapping the state of every element of republicanism. The Italian allies went into revolt, and forced their way into the privileges of the franchise; but intrigue effected their real defeat in the struggle for substantial power, and their success did not touch the economic condition of Italy. Sulla was able to carry reactionary legislation which turned the constitution back in some respects as far as the times of Servius, and established upon a basis of definite law the control of the oligarchy. The extreme policy of the oligarchs produced reaction; but reaction did not strengthen the people; it only developed factions: the time of healthful reaction had passed, and the period of destroying civil war had come. Civil war opened the doors to Cæsar and the several triumvirates, and finally Rome saw her first emperor in Octavius. The stages of the transformation are perfectly plain: there had been (1) the decay of the free peasantry and the transfer of economic power from the many to the few; (2) the consolidation of oligarchic power in the Senate; (3) reactions and factional wars; (4) the interference of Cæsar, fresh from great successes in Gaul and backed by a devoted army; (5) the formal investiture of a single man with controlling authority in the state. Disorder and civil war had become chronic

in the degenerate state, and had been cured in the only feasible way.

165. **Transmutation of Republican into Imperial Institutions under Augustus.** — But even in the final stage of the great change all appearance of radical alteration in time-honored institutions was studiously and circumspectly avoided. The imperial office was not created out of hand, but was slowly pieced together out of republican materials; and the process of its creation was presided over by Octavius, the best possible man for the function, a man who was at once a consummate actor and a consummate statesman. Of course there was and could be no concealment of the fact that predominance in the state had been given to one man; but the traditions of the republic furnished abundant sanction for the temporary investiture of one man with supreme authority: the dictatorship had been a quite normal office in the days of the Republic's best vigor. What it was possible and prudent to conceal was, that one man had become permanent master and that republican institutions had been finally overthrown. Even the time-honored forms of the dictatorship, therefore, were avoided: the dictatorship was an office raised above the laws and rendered conspicuous in its supremacy, and had, moreover, been rendered hateful by Sulla. All that was desired was accomplished by the use of regular republican forms. The framework of the old constitution was left standing; but new forces were made to work within it.

166. In the year 43 B.C. Octavius had formed with Antonius and Lepidus the second triumvirate and had received along with these colleagues, by decree of the people, supreme authority in that capacity for a period of five years; at the end of those five years (B.C. 38) the powers of the triumvirate were renewed for another term of the same length. This second period of the triumvirate witnessed the steady advance of Octavius in power and influence at the expense of his colleagues. His own powers survived the expiration of the five

years (B.C. 33). In B.C. 31, exercising the military *imperium* conferred upon him in 32, he met and defeated Antonius at Actium, pretending to meet him, not as a rival, but as a leader of the revolted East; and after Actium he was supreme. But he still made no open show of any power outside the laws. The years 28 and 29 B.C. saw him consul, with his close friend Agrippa as colleague. By virtue of the censorial powers originally belonging to the consular office, and now specially conferred upon him, he effected a thorough reformation of the Senate, raising the property qualification of its members, introducing into it fresh material from the provinces, purging it of unworthy members, and otherwise preparing it as an instrument for the accomplishment of his further purposes. In B.C. 28 he formally resigned the irregular powers which he had retained since 33 by virtue of his membership of the triumvirate, declaring the steps which he had meantime taken as triumvir illegal, and pretended to be about to retire from the active direction of affairs. Then it was that the process began which was to put the substance of an empire into the forms of the republic.

167. In the year 27 B.C. he suffered himself to be persuaded by the senators to retain the military command for the sake of maintaining order and authority in the less settled provinces, and over these provinces he assumed a very absolute control, appointing for the administration of their affairs permanent governors who acted as his lieutenants, and himself keeping immediate command of the forces quartered in them. The other provinces, however, remained 'senatorial,' their affairs directed by the Senate's decrees, their pro-consuls or pro-prætors appointed by the Senate, as of old. Avoiding the older titles, which might excite jealousy, Octavius consented to be called by the new title, sufficiently vague in its suggestions, of 'Augustus.' Presently, in 23 B.C. and the years immediately following, he was successively invested with tribunician, with pro-consular, and with consular powers, accepting these powers for life. In 19 B.C. he was formally entrusted with supervision

of the laws, and in 12 B.C. he became Pontifex Maximus. His powers were at length complete. But his assumption of these powers did not mean that the old republican offices had been set aside. He was not consul, he simply had consular powers; he was not tribune, but only the possessor of tribunician powers. Consuls, tribunes, and all other officers continued to be elected by the usual assemblies as always before, though, in the case of the consuls, with shortened terms, — the emperor was in form only associated with them. Above all, the Senate still stood, the centre of administration, the nominal source of law, 'Augustus' sitting and voting in it like any other senator, distinguished from the rest neither in position nor in dress, demeaning himself like a man among his equals. In reality, however, he was of course dictator of every step of importance, the recognized censor upon whose will the composition of the Senate depended, the patron to whose favor senators looked for the employment which gave them honor or secured them fortune. Long life brought Augustus into the possession of an undisputed supremacy of power, in the exercise of which he was hampered not at all by the republican forms under which he forced himself to act. He even found it safe at length to surround himself with a private cabinet of advisers to whom was entrusted the first and real determination of all measures whether of administration or of legislation. The transmutation of republican into imperial institutions had been successfully effected; subsequent emperors could be open and even wanton in their exercise of authority.

168. No nation not radically deficient in a sense of humor could have looked upon this masquerade with perfect gravity, as the Romans did. One constantly expects in reading of it to learn of its having been suddenly broken up by a burst of laughter.

Of course it must be remembered how welcome the order secured by the new *régime* must have been after so long a period of civil strife and anarchy; and that the men of courage and initiative who would have organized resistance or spoken open exposure of the designs of Augustus had perished in the wars and proscriptions of previous revolutions.

The state wanted rest and order and lacked leaders who would have resisted the purchase of order or rest at too great a cost to liberty.

Octavius had, moreover, since Actium, been at the head of about two score veteran legions, "conscious of their strength, and of the weakness of the constitution, habituated, during twenty years of civil war, to every act of blood and violence, and passionately devoted to the house of Cæsar."[1] It might have been dangerous to laugh at the farce.

169. **The Completed Imperial Power.** — The emperor, thus created as it were a multiple magistrate and supreme leader in all affairs of state, though nominally clothed with many distinct powers, in reality occupied an office of perfect unity of character. He was the state personified. No function either of legislative initiative or of magisterial supervision and direction was foreign to his prerogatives: he never spoke but with authority; he never wished but with power to execute. The magistrates put into the old offices by popular choice were completely dwarfed in their routine of piece-meal functions by the high-statured perfection of his power, rounded at all points and entire. Such minor powers as were needed to complete the symmetry of his office were readily granted by the pliant Senate. A citizen in dress, life, and bearing, he was in reality a monarch such as the world had not before seen.

170. **The New Law-making.** — The only open breach with old republican method was effected in the matter of legislation. Even the forms of popular legislation ceased to be observed; the popular assemblies were left no function but that of election; the senate became, in form at least, the single and supreme law-making authority of the state. The senate was, indeed, the creature of the emperor, senators being made or unmade at his pleasure; but it had an ancient dignity behind which the power of the sovereign took convenient shelter against suspicion of open revolution. Its supreme decrees, as Gibbon says, were at once dictated and obeyed. "Henceforth

[1] Gibbon, Chap. III. (Vol. I., p. 36, of Harper's edition, 1840).

the emperor is virtually the sole source of law, for all the authorities quoted in the courts are embodiments of his will. As magistrate he issues *edicts* in accordance with the old usage in connection with the higher offices which he held, as did the prætors of the earlier days. When sitting judicially he gave *decrees;* he sent *mandates* to his own officials, and *rescripts* were consulted by them. He named the authorized jurists whose *responses* had weight in the nice points of law. Above all he guided the decisions of the Senate whose *Senatus consulta* took the place of the forms of the republican legislation."[1]

The elective prerogatives of the popular assemblies survived only the first imperial reign. During the reign of Tiberius the right to elect officers followed the legislative power, passing from the assemblies to the Senate.

Singularly enough the diminished offices still open to election were much sought after as honors. Though filled for the most part with candidates named by the emperor, they solaced the civic ambitions of many a patrician.

171. **Judicial Powers of the Senate.** — What principally contributed to maintain the dignity and importance of the senate in the early days of the Empire was its function as a court of justice. In the performance of this function it was still vouchsafed much independence. Some belated traditions of that ancient eloquence which the Senate of the Republic had known and delighted in, but which could live only in the atmosphere of real liberty, still made themselves felt in the debate of the great cases pleaded in the patrician chamber.

172. **Growth of New Offices.** — As the imperial office grew and the constitution accommodated itself to that growth, a new official organization sprang up round about it. Præfects (*præfecti*) there had been in the earlier days, deputies commissioned

[1] *The Early Empire* (Epochs of Ancient History series), by W. W. Capes, p. 181.

to perform some special magisterial function; but now there came into existence a permanent office of Præfect of the City, and the incumbent of the office was nothing less than the Emperor's vice-regent in his absence. Prætorian cohorts were organized, under their own Præfect, as the Emperor's special body-guard. The city, too, was given a standing force of imperial police. Procurators (proctors), official stewards of the Emperor's privy purse both at home and in the provinces, at first well regulated subordinates, came presently into very sinister prominence. And the Privy Council of the monarch more and more absorbed directive authority, preparing the decrees which were to go forth in the name of the Senate.

173. **The Provinces.** — But it was the provinces that gave to the Empire a life and a new organization all its own. If the Republic had proved a failure in Rome because of economic decay, and the too great strains of empire, how much greater had its failure been for the provinces! No one had so much reason to welcome the establishment of the imperial government as had the provincials; and none so well realized that there was cause for rejoicing in the event. The officials who had ruled the provinces in the name of the Republic had misgoverned, fleeced, ruined them at pleasure, and without responsibility; for the city democracy was a multitudinous monarch without capability for vigilance. But with a single and permanent master at the seat of government the situation was very different. His financial interests were identified with the prosperity of the provinces not only, but also with the pecuniary honesty and administrative fidelity of the imperial officers throughout the Empire; with him it was success to keep his subordinates in discipline, failure to lose his grip upon them. That province esteemed itself fortunate, therefore, which passed from senatorial control and became an imperial province, directly under the sovereign's eye (sec. 167); but even in the senatorial provinces the emperor's will worked for order, subordination, discipline, for regular, rigid control.

Under the emperors, moreover, the Senate gained a new interest in the provinces, for its membership became largely provincial. The notables of the provinces, men of prominent station, either for wealth or for political service, in the provinces, gained admission to the Senate. There were at last champions of the provinces within the government, as well as imperial officials everywhere acting as the eye of the Emperor to search out maladministration, and as his mouth-pieces to speak his guiding will in all things.

174. **The Empire overshadows Rome.** — In another and even more notable respect, also, the provinces were a decisive make-weight in the scale of government after the establishment of the Empire. The first five emperors (Augustus to Nero) figured as of the Julian line, the line of Cæsar, and under them the Empire was first of all Roman, — was Rome's; but for their successors, Rome, though the capital, was no longer the embodiment of the Empire. The levelling of Rome with the provinces began, indeed, with Augustus; both the personal and the municipal privileges hitherto confined for the most part to the capital city and its people were more and more widely and liberally extended to the towns and inhabitants of the provinces. Gradually the provinces loomed up for what they were, by far the greatest and most important part of the Empire, and the emperors began habitually to see their dominion as a whole. Under the successors of the Julian emperors this process was much accelerated. Presently Trajan, a Roman citizen born, not in Italy, but in Spain, ascended the throne. Hadrian also came from a family long settled in Spain; so, too, did Marcus Aurelius. Under such men the just balance of the Empire was established; the spell was broken; the emperors ruled from Rome, but not for Rome: the Empire had dwarfed the city.

175. **Nationality of the Later Emperors.** — The later emperors, introduced during the *régime* of military revolution, were some of them not even of Roman blood. Elagabalus was a sun-priest from Syria;

Maximin was a Thracian peasant; Diocletian, with whom the period of military revolution may be said to have closed, and who was the reorganizer of the Empire, was born of a humble Dalmatian family. Henceforth Latin blood was to tell for little or nothing. The centre of gravity had shifted away from Rome. After the second century even the Latin language fell into decay, and Greek became the language of universal acceptance and of elegant use.

176. **The Army.** — The elevation of the provinces to their proper status within the Empire meant, however, most unhappily, the elevation of the provincial armies to political prominence. Very early in the history of Rome's conquests her armies had come to be made up largely of provincial levies, and as the Empire grew, the armies by which it was at once extended and held together, became less and less Roman in blood, though they remained always Roman in discipline, and long remained Roman in spirit. Gauls, Germans, Scythians, men from almost every barbarian people with which Rome had come in contact, pressed or were forced into the Roman service. And by the time the last days of the Republic had come, the government trembled in the presence of the vast armies which it had created. Augustus studiously cultivated the indispensable good-will of his legions. It was the prætorian guard that chose Claudius to be Emperor. Very early the principle was accepted that the Emperor was elected "by the authority of the Senate, *and the consent of the soldiers.*" Galba, Otho, and Vitellius were the creatures of the military mob in Rome. Even the great Flavian emperors came to the throne upon the nomination and support of their legions. And then, when the best days of the Empire were past, there came that dreary period of a hundred years, and more than a score of emperors, which was made so hideous by the ceaseless contests of the provincial armies, as to which should be permitted to put its favorite into the seat of the Cæsars.

177. **Changes in the System of Government.** — It was in part the violence of this disease of the body politic that sug-

gested to the stronger emperors those changes of government which made the Empire of Constantine so different from the Empire of Augustus, and which exhibited the operation of forces which were to bring the government very near to modern patterns of absolute monarchical rule. But before military revolutions had compelled radical alterations of structure in the government, the slow developments of the earlier periods of the Empire had created a civil service quite unlike that which had served the purposes of the Republic. Noble Romans had time out of mind been assisted in the administration of their extensive private estates and their large domestic establishments by a numerous staff of educated slaves; and it was such a domestic and private machinery which the first emperors employed to assist them in public affairs. One domestic served as treasurer, another as secretary, a third as clerk of petitions, a fourth as chamberlain. It required many a decade of slow change to reveal to the eye of the free Roman that any honor lay in this close personal service of a sovereign master. The free Roman of the days of the Republic had served the state with alacrity and pride, but would have esteemed the service of any individual degrading: domestic association with and dependence upon a leader, even upon a military leader, had never seemed to him, as it did seem to the free Teuton (secs. 226–228), compatible with honor; much less could it seem to him a source of distinction. But the ministerial offices clustering about the throne and by degrees associated with great influence and power at last came to attract all ambitions. From the first, too, patricians had stood close about the person of the Emperor as his privy councillors. These councillors became the central figures of the monarch's court: they were his 'companions' (his *comites*, the word from which we get the modern title *count*). The later day when all service of the Emperor had become honorable to free men saw the name of *comites* transferred to the chief permanent functionaries of the imperial service.

The domestic ministerial service of the early Empire was of course the same in germ as that organization of stewards, chamberlains, butlers, and the rest to be found in the courts of mediæval Europe, out of which our modern ministries and cabinets have been evolved. It was to come very near to its modern development, as we shall see, under Constantine (sec. 184).

178. Of course, as the imperial system grew, offices multiplied in the provinces also. Provincial governors had at first little more than functions of presidency and superintendence. Local autonomy was by the wiser emperors for a long time very liberally encouraged. The towns of the provinces were left to their own governments, and local customs were suffered to retain their potency. But steadily the imperial system grew, by interference, sometimes volunteered, sometimes invited. The usual itching activity took possession of the all-powerful bureaucracy which centralized government created and fostered. Provincial governors were before very long surrounded by a numerous staff of ministers; a great judicial system sprang up about them, presided over often by distinguished jurists: Roman law penetrated, with Roman jurisdiction and interference, into almost every affair both of public and of private concern. Centralization was not long in breeding its necessary, its legitimate, hierarchy. The final fruit of the development was a civil service, an official caste, constituted and directed from the capital and regulated by a semi-military discipline.

179. **Constitutional Measures of Diocletian.** — The period of revolution and transition, the period which witnessed the mutinous ascendency of the half-barbaric soldiery of the provinces, lasted from the year 180 to the year 284. In the latter year Diocletian ascended the throne, and presently exhibited in the changes which he introduced the constitutional alterations made necessary by that hundred years of fiery trial. All the old foundations of the constitution had disappeared: there was no longer any distinction between Romans and barbarians within the Empire: the Empire, indeed, was more barbarian

than Roman: the mixed provincial armies had broken down all walls of partition between nationalities. With the accession of Diocletian the Empire emerges in its new character of a pure military despotism. The Senate and all the old republican offices have disappeared, except as shows and shadows, contributing to the pageantry, but not to the machinery of the government. The government assumes a new vigor, but dispenses with every old-time sanction. The imperial rule, freed from old forms, has become a matter of discipline and organization merely.

180. The measures of Diocletian were experimental, but they furnished a foundation for what came afterwards from the hand of Constantine. Diocletian sought to secure order and imperial authority by dividing the command of the Empire under chiefs practically independent of each other and of him, though acting nominally under his headship. He associated Maximian with himself as co-regent, co-Augustus, with a separate court at Mediolanum (Milan), thence to rule Italy and Africa. His own court he set up at Nicomedia in Bithynia, and he retained for himself the government of the East, as well as the general overlordship as chief or senior 'Augustus.' The frontier provinces of Gaul, Britain, and Spain he entrusted to the government of a 'Cæsar,' for whom Augusta Trevirorum (Trier) in Gaul served as a capital; the control and defence of Illyricum to another 'Cæsar,' who held court at Sirmium. The two 'Cæsars' served as assistants, and posed as presumptive successors, of the two 'Augusti,' ruling the more difficult provinces, as younger and more active instruments of government. Each Augustus and each Cæsar exercised supreme military and civil authority in his own division of the Empire, though each formally acknowledged Diocletian head over all.

This system marks the abandonment of Rome as a capital and the recognition of a certain natural division between the eastern and the western halves of the Empire.

181. **Reforms of Constantine.** — This division of authority, of course, brought about, after the retirement of Diocletian, a struggle for supremacy between many rivals: that struggle issued, fortunately, in the undisputed ascendency of Constantine, a man able to reorganize the Empire. The first purpose of the new Emperor, indeed, was to recast the system altogether. He meant to divide administrative authority upon a very different plan, which should give him, not rivals, but servants. His first care was to separate civil from military command, and by thus splitting power control it. There was henceforth to be no all-inclusive jurisdiction save his own. For the purposes of civil administration he kept the fourfold division of the territory of the Empire suggested by the arrangements of Diocletian, placing over each 'prefecture' (for such was the name given to each of the four divisions) a Prætorian Præfect empowered to act as supreme judge, as well as supreme financial and administrative agent of the Emperor, in his special domain, as the superintendent of provincial governors, and as final adjudicator of all matters of dispute: as full vice-regent, in short, in civil affairs.

Under the arrangements of Diocletian each Augustus and each Cæsar had had a prætorian præfect associated with him as his lieutenant, — as successors under much altered circumstances to the title of the old-time prætorian præfect of Rome. Under Constantine there were the four præfects, but no Augusti or Cæsars placed over them, no master but Constantine himself, and possessing functions utterly dissimilar from those of the older prætorian præfect in that they were not at all military, but altogether civil.

The prætorian guards were finally abolished under Constantine. For them the play was over.

182. The four præfectures Constantine divided into thirteen 'dioceses' over which were placed vicars or vice-præfects; and these dioceses were in their turn divided into one hundred and sixteen provinces governed, a few by pro-consuls, a somewhat larger number by 'correctors,' many by 'consulars,' but most by 'presidents.'

"All the civil magistrates," says Gibbon, "were drawn from the profession of the law." Every candidate for place had first to receive five years' training in the law. After that he was ready for the official climb: employment in successive ranks of the service might bring him at last to the government of a diocese or even a præfecture.

183. Such was the civil hierarchy. Military command was vested in four Masters-General superintending thirty-five subordinate commanders in the provinces.

These subordinate commanders bore various titles; they were all without distinction dukes (*duces*, leaders); but some of them had attained to the superior dignity of counts (*comites*).

184. **The Household Offices.** —Constantine emphasized the break with the old order of things by permanently establishing his capital at Byzantium, which thereupon received the name of Constantinople, a name whose Greek form still further points the significance of the shifting of the centre of the Empire. Rome herself had, so to say, become a province, and the administration was in the Greek East. The court at Constantinople, moreover, took on the oriental magnificence, treated itself with all the seriousness in points of ceremony, with all the pomp and consideration that marked the daily life of an Eastern despotism. The household offices, created in germ in the early days of the Empire (sec. 177), had now expanded into a great hierarchy, centring in seven notable offices of state, and counting its scores and hundreds of officials of the minor sort. There was, (1) the *Great Chamberlain;* (2) the *Master of Offices*, whom later days would probably have called justiciar, a magistrate set over all the immediate servants of the crown; (3) an imperial chancellor under the name, now entirely stripped of its old republican significance, of *Quæstor* (sec. 156); (4) a *Treasurer-General*, superintendent of some twenty-nine receivers of revenue in the provinces, overseer also of foreign trade and certain manufactures; (5) a treasurer called *Count of the Privy Revenue* of the monarch; (6 and 7) two *Counts of the Domestics*, new prætorian præfects, commanding,

the one the cavalry, the other the infantry, of the domestic troops, officers who in later times would probably have been known as constable and master of the horse.

185. We have thus almost complete in the system of government perfected by Constantine that machinery of household officers, military counts, and provincial lieutenants which was to serve as a model throughout the Middle Ages wherever empire should arise and need organization. The 'companions' (*comites*) of the Teutonic leaders held a much more honorable position than did the domestic servants of the Roman Emperor, and their dignity they transmitted to the household officers of the Teutonic kingdoms; but the organization effected by Constantine anticipated that system of government which has given us our provincial governors and our administrative cabinets.

186. **The Eastern and Western Empires; Greek and Teuton.** — The conquests within the Empire effected by the Teutonic peoples in the fifth century and the centuries immediately following cut away the West from the dominions of the Emperor at Constantinople. The division between East and West, which Diocletian had recognized in his administrative arrangements, at length became a permanent division, not merely an administrative, but a radical political separation, and the world for a while saw two empires instead of one: a Byzantine or Greek empire with its capital at Constantinople, and a Western empire with its capital at Rome or Ravenna. When Italy fell again nominally to the Eastern Empire, in 476, she did not carry the rest of Western Europe with her. The West had fallen apart under the hands of the Germans, and was not to know even nominal unity again until the Holy Roman Empire should arise under Charles the Great (sec. 364). Meantime, however, the Eastern Empire retained in large part its integrity and vigor, as well as its administrative organization also. It was not to be totally overthrown until 1453.

187. **Religious Separation and Antagonism.** — The political separation thus brought about between the Eastern Empire and the

peoples of the West was emphasized and embittered by religious differences. Christianity had been adopted by Constantine, and had practically continued to be the religion of the Eastern Empire without interruption; but the Christian doctrine of the East was not the same as the Christian doctrine of the West; the ecclesiastical party centring in the episcopate at Rome violently antagonized the doctrines received at Constantinople. The world therefore saw two churches arise, with two magnates, the Pope at Rome and the Patriarch at Constantinople, the one virtually supreme because in the West where he was overshadowed by no imperial throne, the other dominated by a throne and therefore partially subordinate. This religious difference, accompanying as it did differences of language and tradition also, the more effectually prevented political unity and even political intercourse between the East and the West, and thus assisted in setting Western Europe apart to a political development of her own.

General Summary.

188. **The City the Centre of Ancient Politics.** — We are now in a position to understand how the full-grown Greek and Roman governments, which are so perfectly intelligible to our modern understandings, were developed from those ancient family states in which we saw government begin, and of which both Greek and Roman institutions bore such clear traces, but which it is so difficult for us now to imagine as realities. It is plain, in the first place, how that municipal spirit was generated which was so indestructible a force in ancient politics. The ancient city was not merely a centre of population and industry, like the cities of the present day; if merchants and manufacturers filled its markets, that was merely an incident of the living of many people in close proximity; and the existence of the city was quite independent of the facilities it offered for the establishment of a mart. Life about a common local centre in compact social organization was a necessity to a patriarchal confederacy of families, *phratries*, and tribes. And until Roman empire had trodden out local independence, compacted provinces, and so fused the materials and marked the boundaries for nationalities; until those nationalities had

been purged by the feudal system, kneaded into coherent masses by the great absolute monarchies of the Middle and Modern Ages, vivified by Renaissance and Reformation, and finally taught the national methods of the modern popular representative state, the city, the municipality, — the compact, co-operative, free population of a small locality, — continued to breathe the only political life of which the world could boast. Politics, — the affairs of the πόλις (*polis*), the city, — divorced from municipal government was a word of death until nations learned that combination of individual participation in local affairs and representative participation in national affairs which we now call self-government. The free cities of the Middle Ages are the links through which have been transmitted to us the liberties of Greece and Rome.

189. **The Approaches to Modern Politics: Creation of the Patriarchal Presidency.** — Rome's city government, as I have shown, fell under the too tremendous weight of empire: the Greek cities went down under the destructive stress of unintermitted war among themselves and irresistible onset from Macedonia and Rome; but before they yielded to imperialism, they had come at many points very near to modern political practice. And the stages by which the approach was made are comparatively plain. It is probable, to begin with, that the governments depicted in Homer were not the first but the second form of the primitive city constitution. The king had doubtless first of all been absolute patriarchal chief of the confederated tribes, and the king's council to be seen in Homer may be taken to represent the success of an aristocratic revolution whose object it had been to put the heads of the ancient families upon a footing of equality with the king. He had thus become merely their patriarchal president.

190. **Citizenship begins to be Dissociated from Kinship.** — But this aristocracy contained the seeds of certain revolution. As dissociated chieftains the Elders had maintained at least a distinct family authority, and so preserved the integrity of each

separate family organization; but as associated councillors they in a measure merged their individuality, at least their solidarity; the law of primogeniture began to be weakened, and a drift was started towards that personal individuality, as contradistinguished from corporate, family individuality, which distinguishes modern from very ancient politics. Men began to have immediate connection with the state, no longer touching it only through their family chief. Citizenship began to dissociate itself from kinship.

191. **Influence of a Non-Citizen Class.** — And by the time individual citizenship had thus emerged, a population alien to the ancient kin and unknown to the politics of the ancient city was at the gates of the constitution demanding admittance. A non-citizen class, alien or native in origin, *plebs*, clients, metics or *periœci*, assisted to riches by enterprise in trade or by industry in the mechanic arts, or else sprung into importance as the mainstay of standing armies, demanded and gained a voice in the affairs of states which they had wearied of serving and had determined to rule.

192. **Discussion determines Institutions.** — And they brought with them the most powerful instrument of change that politics has ever known. The moment any one was admitted to political privileges because he demanded it, and not because entitled to it by blood, it was evident that the immemorial rule of citizenship had been finally overset and that thereafter discussion, a weighing of reasons and expediencies, was to be the only means of determining the forms of constitutions. Discussion is the greatest of all reformers. It rationalizes everything it touches. It robs principles of all false sanctity and throws them back upon their reasonableness. If they have no reasonableness, it ruthlessly crushes them out of existence and sets up its own conclusions in their stead. It was this great reformer that the *plebs* had brought in with them. It was to be thereafter matter for discussion who should be admitted to the franchise.

193. **Politics separated from Religion.** — The results, though oftentimes slow in coming, were momentous. Laws and institutions took on changed modes of life in this new atmosphere of discussion. The outcome was, in brief, that Politics took precedence of Religion. Law had been the child of Religion: it now became its colleague. It based its commands, not on immemorial customs, but on the common will. The principles of government received the same life. Votes superseded auguries and the consultation of oracles. Religion could not be argued; politics must be. Their provinces must, therefore, be distinguished. Government must be the ward of discussion: religion might stay with the unchanging gods.

194. **Growth of Legislation.** — Nor was this the only consequence to law. Once open to being made by resolution of assemblies, it rapidly grew both in mass and in complexity. It became a multiform thing fitted to cover all the social needs of a growing and various society; and a flexible thing apt to be adjusted to changing circumstances. Evidently the legislation of modern times was not now far off or difficult of approach, should circumstances favor.

195. **Empire.** — Finally, the conquests of the Greeks under Alexander suggested, and Rome in her conquering might supplied, what had not been dreamed of in early Aryan politics, namely, wide empire, vast and yet centralized systems of administration. The first framework was put together for the organization of widespread peoples under a single government. Ancient politics were shading rapidly off into modern.

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IV.

ROMAN DOMINION AND ROMAN LAW.

196. **Currency of Roman Law.** — Roman law has entered into all modern systems of jurisprudence as the major element in their structure not only, but also as a chief source of their principles and practice, having achieved perpetual dominancy over all legal conception and perpetual presidency over all legal development by reason alike of its singular perfection and its world-wide currency; and it was Roman empire which gave to that law both its quality and its universality. The character of Roman law and the course and organization of Roman conquest are, therefore, topics which must be kept in mind together.

197. **Character of Early Roman Law.** — Until Rome had gone quite far in her career of conquest Roman law was, perhaps, not more noteworthy than Greek law or early Germanic custom. In the early history of the city her law was only a body of ceremonial and semi-religious rules governing the relations of the privileged patrician *gentes* to each other and to the public magistrates. The proper procedure for the settlement of disputes between citizens was a sacerdotal secret, from all knowledge of which the commonalty was entirely shut out. Solemn arbitration under complex symbolical forms was almost the whole of legal practice, outside the private adjudications of law by family authorities. If any provision existed for securing the rights of a non-patrician, he could know what that provision was only by putting his case to the test of a

trial: and he knew that even when that case had been brought to a successful issue, no precedent had been established; it was still a secret with the privileged classes what the general rules of the law might be.

198. **Plebeian Discontent with the Law: the XII Tables.** — In the breaking up of this selfish and narrow system, as in the modification of political practice, the imperative discontent of the plebeians was the chief force. They early demanded admission to the knowledge of the law as well as to the exercise of the magisterial power. The first step upon which they insisted was the codification and publication of existing law. Accordingly, in 451 and 450 B.C., the now celebrated XII Tables were prepared and made public by two successive special commissions of ten, the *Decemvirs*. The first decemvirate commission consisted altogether of patricians, and is said to have prepared the first ten 'tables' of the law. The second included three plebeians and added two more tables to the code. Probably this was the first time that the legal practices of the city had been reduced to anything like systematic statement; and in being stated they must have been to a certain extent modified. Written exposition was a thing almost entirely foreign to the habit of that primitive age; both because of the limitations imposed by mental habit, therefore, and of the difficulties created by the unwilling materials with which they had to write, the sentences of the law engraved upon the copper tablets set up in the Forum must have been brief and compact. By being thus condensed the law must, moreover, have lost some of its original flexibility and have become the more rigid for being made the more certain. (Compare sec. 71.)

The forms of legal actions were still held back: these the XII Tables did not contain; and it was, after all, upon a knowledge of the forms of action that the patrician monopoly of justice chiefly depended. It required a new and energetic plebeian agitation to make public the valuable secrets of pro-

cedure, — secrets necessarily so weighty in an age when law was married to religion, and when religion was so largely a thing of forms and ceremonies. Finally, however, the new agitation also was successful, and the plebeians came, so to say, into complete possession of the law.

199. **The Growth of the Law: Interpretation.** — But there was advantage in certainty as to the content of the law. The law was now a thing known of all, at least, and not a private and peculiar cult: and the XII Tables became the corner-stone of the whole structure of Roman jurisprudence. All legal interpretation began with the XII Tables; all subsequent interpretative development proceeded from them out. For the chief principle of growth in Roman law was interpretation, adjustment, rather than legislation: the application of old principles to new cases, not the formulation of new principles.

200. **The Prætors: the Prætor Urbanus.** — This principle of growth becomes most evident in the legal history of Rome after the creation of the Prætorships and the investiture of the Prætors with the judicial functions formerly exercised by consuls or king. There was a City Prætor (*Prætor urbanus*) and a Prætor of the Foreigners (*Prætor peregrinus*[1]). The City Prætor was the magistrate to whom citizens resorted for the settlement of conflicting claims. He did not himself settle the matter between them, but he laid the legal basis for its settlement. Having heard their statement of their case, he sent it for decision to some private citizen whom he nominated *judex*, or arbitrator, for the occasion, accompanying his reference of the case with instructions to the arbitrator in which he not only set forth the question at issue, but also formulated the law to which the decision must conform. Very many cases were referred thus each to a single *judex;* in many instances, again, they were sent to a number of *judices* who constituted a sort of board or jury to look into the merits of the controversy.

[1] "*Prætor qui jus dicit inter peregrinos.*"

Always, however, Prætor and *judices* stood towards each other in much the same relation that the judge and jury of our own system hold towards one another: except that the Prætor and *judices* did not sit together and hear cases at the same time. They acted separately and at different times. But the Prætor interpreted the law, and the *judices* passed upon the facts.

201. **The Law and the Prætor's Application of it.** — The law which the Prætor had to expound and apply in the *formulæ* or briefs which he sent down to the *judices*, as at once their warrant and their instructions, was not a law constantly advanced and adjusted by legislation. It was, for the most part, only the XII Tables, a small body of *Senatus-consulta*, or senatorial decrees, and a few legal principles introduced by popular agitation during the long struggle of the plebeians for political privilege. Of formal law-making such as we are nowadays accustomed to look for there was almost none to help him. He himself, therefore, became to all intents and purposes a legislator. The growth of the city, and the constant changes of circumstance and occasion for the use of his law functions which must have attended its growth, of course gave rise to cases without number which the simple, laconic laws of the early time could not possibly have contemplated. To these, however, the Prætor had to apply, with what ingenuity or origination he possessed, such general rules and conceptions as he could discover in the ancient codes: and of course so great a development of interpretation insensibly gave birth to new principles. The Prætor, consciously or unconsciously, became a source of law.

202. **The Prætor's Edict.** — Nor were his interpretative adjustments of the law confined to the 'formulas' concerning individual cases which he sent to the *judices*. At the beginning of his year of office he published an Edict in which he formally accepted the principles acted on by his predecessors, and announced such new rules of adjudication as he intended to adopt during his year of authority. These new

rules were always, in form at least, rules of procedure. The Prætor announced, for example, that he would, hereafter, regard property held by certain methods, hitherto considered irregular or invalid, as if they were held according to due and immemorial form, and would consider the title acquired by means of them as valid. He did not assume to make such titles valid: that would be to change the law. But he could promise in adjudicating cases, to treat them *as if* they were valid, and so practically cure their defects. In a word, he could not create rights, in theory at least; but he could create and withhold *remedies*. It was thus that through successive edicts the law attained an immense growth. And such growth was, of course, of the most normal and natural character. By such slow, conservative, practical, day to day adjustments of practice the law was made easily to fit the varying and diversified needs of a growing and progressive people.

203. **The Prætor Peregrinus.** — The functions of the Prætor of the Foreigners were similar to those of the City Prætor, but much less limited by the prescriptions of old law. He administered justice between resident foreigners in Rome itself, between Roman citizens and foreigners, and between citizens of different cities within the Roman dominion. Roman law, — the *jus civile*, the law administered and developed by the *Prætor urbanus* — was only for Romans. Its origins and fundamental conceptions marked it as based upon tribal customs and upon religious sanctions, which could only apply to those who shared the Roman tradition and worship. It could not apply even as between a Roman and an alien. The Latin and Italian towns which Rome brought under her dominion were, therefore, suffered to retain their own law and judicial practices for their own residents, so far at least as their retention offered no contradiction to Rome's policy or authority; but the law of one town was of course inapplicable to the citizens of any other, and therefore could not be used in cases between citizens of different towns. In all such cases, when

Roman law could not be appealed to, the *Prætor peregrinus* was called upon to declare what principles should be observed.

204. **The Jus Gentium.** — The first incumbents of this delicate and difficult office, of Prætor *peregrinus*, were doubtless arbitrary enough in their judgments, deciding according to any rough general criteria of right or wrong, or any partial analogies to similar cases under Roman law that happened to suggest themselves. But they seem, nevertheless, to have had a sincere purpose to be just, and at length the Roman habit of being systematic enabled them to hit upon certain useful, and as it turned out, momentous, general principles. They of course had every opportunity for a close observation and wide comparison of the legal practices and principles obtaining among the subject nations among whom their duties lay, and they presently discovered certain substantial correspondences of conception among these on many points frequently to be decided. With their practical turn for system, they availed themselves of these common conceptions of justice as the basis of their adjudications. They sought more and more to find in each case some common standing-ground for the litigants in some legal doctrine acknowledged among the people of both. As these general principles of universal acceptance multiplied, and began to take systematic form under the cumulative practice of successive Prætors, the resultant body of law came to be known among the Romans as the *jus gentium*, the law of the nations, — the law, *i.e.*, common to the nations among whose members Roman magistrates had to administer justice.

205. **The Jus Gentium not International Law.** — This body of law had, of course, nothing in common with what we now call the Law of Nations, that is, International Law. International law relates to the dealings of nation with nation, and is in largest part *public* law — the law of state, of political, action (secs. 1216, 1217). The *jus gentium*, on the other hand, was only a body of *private* and commercial law, chiefly

the latter. It had nothing to do with state action, but concerned itself exclusively with the relations of individuals to each other among the races subject to Rome. Rome decided political policy, her Foreign Prætor decided only private rights.

206. **Influence of the Jus Gentium upon the Jus Civile.** — But of course the *jus gentium* attained an influence of great importance, even over the development of Roman law itself. Its principles, partaking of no local feátures or special ideas produced by the peculiar history or circumstances of some one people, but made up of apparently universal judgments as to right and wrong, justice and injustice, seemed to be entitled to be considered statements of absolute, abstract equity. As they became perfected by application and studious adaptations to the needs of a various administration of justice, it became more and more evident that the *jus civile*, the exclusive law under which the Roman lived, was arbitrary and illiberal, by comparison. The Prætor *peregrinus* began to set lessons for the Prætor *urbanus*. The *jus civile* began to borrow from the *jus gentium;* and as time advanced, it more and more approximated to it, until it had been completely liberalized by its example.

207. **Administration of Justice in the Provinces.** — The authority of the Foreign Prætor did not extend beyond Italy, beyond the city's immediate dependencies. In the 'Provinces' proper the governors exercised the functions of Prætor *peregrinus*. The towns of the provinces, like the towns of Italy, were left with their own municipal organization and their own systems of judicature. But between the citizens of different districts of a province there were cases constantly arising, of course, which had to be brought before the governor as judge. Whether as pro-consul, therefore, or as pro-prætor, or under whatever title, the governor was invested with prætorial functions, as well as with military command and civil supremacy. It was with principles of judicial administration that the governor's edict, issued on entering upon office, was largely concerned. Here was another and still larger field for

the growth of the *jus gentium*, — an almost unlimited source of suggestion to Roman lawyers.

208. **The Law of Nature.** — As Rome's conquest grew and her law expanded she did not fail to breed great philosophical lawyers who saw the full significance and importance of the *jus gentium* and consciously borrowed from it liberal ways of interpretation. And they were assisted at just the right moment by the philosophy of the Greek Stoics. The philosophy of the Stoics was in the ascendency in Greece when Rome first placed her own mind under the influence of her subtile subjects in Attica and the Peloponnesus: and that philosophy was of just the sort to commend itself to the Roman. Its doctrines of virtue and courage and devotion seemed made for his practical acceptance: its exaltation of reason was quite native to his mental habit. But its contribution to the thought of the Roman lawyer was its most noteworthy product in Rome.

The Stoics, like most of the previous schools of philosophers in Greece, sought to reduce the operations of nature both in human thought and in the physical universe to some simple formula, some one principle of force or action, which they could recognize as the Law of Nature. They sought to square human thought with such abstract standards of reason as might seem to represent the methods or inspirations of Universal Reason, the Reason inherent, indwelling in Nature. In the mind of the Roman lawyer this conception of a Law of Nature connected itself with the general principles of the *jus gentium*, and served greatly to illuminate them. Probably, it seemed, these conceptions of justice which the Foreign Prætors had found common to the thought of all the peoples with whom they had come into contact were manifestations of a natural, universal law of reason, a Law of Nature superior to all systems contrived by men, implanted as a principle of life in all hearts.

209. The *jus gentium* thus received a peculiar sanction and took on a dignity and importance such as it had never had so long as it was merely a body of empirical generalizations. Its

supremacy was now assured. The *jus civile* more and more yielded to its influences, and more and more rapidly the two systems of law tended to become but one.

210. **Roman Citizenship and the Law.** — This tendency was aided by the gradual disappearance of all the most vital distinctions between the citizen of Rome herself and citizens of her subject cities and provinces. Step by step the citizens first of the Latin towns, then those of the Italian cities, then the citizens of favored outlying districts of the Empire, were admitted, first to a partial and finally to a complete participation in Roman citizenship. And of course with Roman citizenship went Roman law. In this way the *jus civile* and the *jus gentium* advanced to meet each other. Under the emperors this drift of affairs was still further strengthened and quickened till Caracalla's bestowal of citizenship upon all the inhabitants of the Roman world was reached as a logical result.

211. **The Jurists.** — As Roman law grew to these world-wide proportions and became more and more informed by the spirit of an elevating philosophy and the liberal principles of an abstract equity, it of course acquired a great attraction for scholarly men and had more and more the benefit of studious cultivation by the best minds of the city. The Roman advocate was not the trained and specially instructed man that the modern lawyer is expected to be. For some time after the law began to be systematically studied there were no law schools where systematic instruction could be obtained; there were no lawyers' offices in which the novice could serve, and discover from day to day the ins and outs of practice. The advocate was scarcely more than an arguer of the facts before the *judices:* he did not lay much stress upon his own view of the law, or often pretend to a profound acquaintance with its principles. But there did by degrees come into existence a class of learned jurists, a sort of literary lawyers, who devoted themselves, not to advocacy before the jury-courts, but to the private study of the law in its developments from the

XII Tables through the interpretations of the prætorial edicts and the suggestions of the *jus gentium*. They set themselves to search out and elucidate the general philosophical principles lying at the roots of the law, to explore its reasons and systematize its deductions. These jurisprudents were of course not slow to draw about themselves a certain clientage. Though entirely distinct as a class from the 'orators,' or barristers, who assisted clients in the courts, they established in time a sort of 'office practice,' as we should call it. Cases were stated to them and their opinions asked as to the proper judgments of the law. They attracted pupils, too, with whom they discussed hypothetical cases of the greatest possible scope and variety.

212. **Influence of the Jurists.** — In the hands of these private jurists the law of course received an immense theoretical development. And this very much to its advantage. For Roman thinking, like Roman practice, was always eminently conservative. The jurists took no unwarrantable liberties with the law. They simply married its practice to its philosophy, no one forbidding the banns. They most happily effected the transfusion of the generous blood of the *jus gentium* into the otherwise somewhat barren system of the *jus civile*. They were chief instruments in giving to Roman law its expansiveness and universality. For of course their judgments were quickly heard of in the courts. They often gave written as well as oral opinions, and these were always hearkened to with great respect. Their published discussions of fictitious causes came to have more and more direct influence upon the result of those which actually arose in litigation. Advocates and litigants alike turned to them for authoritative views of the law to be observed. And a legal literature of the greatest permanent interest and importance eventually sprang into existence. The jurists collected and edited the written sources of the law, such as the Edicts of the Prætors, and set them in the fuller and fuller light of an advancing scientific criticism.

Their commentaries became of scarcely less importance than the Edicts themselves, containing, as they did, the reasoned intent of Table and Edict.

213. **The Jurisconsults under the Empire.** — This scientific cultivation of the law by scholarly students began before the end of the Republic, was far advanced, indeed, at the time the Empire was established. The beginnings of the scientific law literature of which I have spoken date as far back as 100 B.C.

> The dates 100 B.C. and 250 A.D. are generally taken as marking the beginning and end of the important literary production on the part of the jurists. The most distinguished names connected with this literature are those of Papinian, Ulpian, Gaius, and Julius Paulus.

It was under the emperors, however, that the greater part of this peculiar literary and interpretative development at the hands of the jurists took place. For under the imperial system the jurists were given an exceptional position of official connection with the administration of the law such as no other similar class of lawyers has ever possessed under any other polity. Certain of the more distinguished of them were officially granted the *jus respondendi* which custom had already in effect bestowed upon them, — the right, that is, to give authoritative opinions which should be binding upon juries. Even under the Republic the opinions of the jurisconsults had been authoritative in fact; what the imperial commission did was to render them authoritative in law. Of course if advocates or litigants who were on opposite sides in any case could produce opposite or differing opinions from these formally commissioned jurisconsults, it devolved upon the *judices* to choose between them; but they were hardly at liberty to take neither view and strike out an independent judgment of their own, and when the jurisconsults agreed, the *judices* were of course bound to decide in accordance with their opinion. Certain writers — 'text writers,' as we call them — on our own law have, by virtue of perspicacity and learning, acquired

an influence in our courts not much inferior to that of the Roman jurisconsults, but no Blackstone or Story has ever been commissioned by the state to be authoritative.

Under the Empire the jurisconsults acquired more than the right of response: they became actively engaged in the administration of law, exercising judicial functions and applying to actual adjudication the tests which they had in the republican period applied only in the form of unofficial opinions.

In the time of Augustus we find two law schools in Rome, and later times saw many others established in important provincial cities.

214. **Imperial Legislation.** — The influence of the jurisconsults extended beyond the administration to the creation of law. Legislation under the early emperors, from Augustus to Hadrian, retained something of its old form. During the reign of Augustus the popular assemblies were still given leave to pass upon the laws which the emperor, as tribune, submitted to them; and during a great part of the imperial period the Senate was formally consulted concerning most of the matters of law and administration over which it had once had exclusive jurisdiction (secs. 165–170). But neither Senate nor people were independent. The former was at the mercy of the emperor's power as censor; the latter were at the disposal of his powers as tribune. Law, consequently, came to emanate more and more undisguisedly from the emperor's single will, — from his edicts as magistrate and from his instructions and decisions as head of the judicial administration. And, happily for Roman law, the emperors made trusted counsellors of the leading jurisconsults and suffered themselves to be guided by them in their more important law-creations and judgments. Probably most edicts and imperial decisions were prepared, if not conceived, by competent lawyers. Imperial legislation, therefore, in the most critical period of its early development, was under the guidance of the most enlightened and skilful jurists of the time, and so was kept to the logical lines of its normal and philosophical growth.

The jurisconsults may be said to have presided over all phases of its development at the important period when that development was conscious and deliberate.

215. **The Codification of the Law.** — The last important step in the preparation of Roman law for modern uses was its codification by the later emperors. Several emperors undertook to reduce the mass of edicts, *Senatus-consulta*, rescripts, etc., which had accumulated during the imperial period to a single code. The most important efforts of this sort were those made by Theodosius (379–395 A.D.) and Justinian (529–534 A.D.). The Theodosian Code is important because it influenced the legislation of the first Teutonic masters within the Empire; the Justinian, because it was by far the most complete and scientific of the codes, and because it has been the basis of subsequent studies and adaptations of Roman legal practice the world over. The republican legislation and the prætorial edicts of the period of the Republic had received final formulation and fusion at the hands of the jurists by the time the fourth century was reached; all that remained for the emperors to do was to digest the writings of the jurists and codify the later imperial constitutions. The Theodosian Code went but a very little way in the digesting of the writings of the great law writers; the Justinian Code, however, which was prepared under the direction of the great lawyer, Trebonian, was wonderfully successful in all branches of the difficult and delicate task of codification. It consists, as we have it, of four distinct parts: 1. The *Pandects* or Digest of the scientific law literature; 2. The *Codex* or Summary of imperial legislation; 3. The *Institutions*, a general review or text-book founded upon the Digest and Code, an introductory restatement, in short, of the law; and 4. The *Novels*, or new imperial legislation issued after the codification to fill out the gaps and cure the inconsistencies discovered in the course of the work of codifying and manifest in its published results.

The whole constituted that body of laws which was to be known to the times succeeding the twelfth century as the *Corpus Juris Civilis*, or Body of the Civil Law. All law was now civil law, the law of Rome; there was no longer any necessary distinction between *jus civile* and *jus gentium*.

216. The *Corpus Juris Civilis* became at once the law of the Eastern Empire, and for a time the law of Italy also. It did not dominate the legal developments of the West outside of Italy, however, until the Middle Ages, for Justinian had his capital at Constantinople and never controlled any important part of what had been the western half of the old Empire, except Italy, and even Italy he united only temporarily and precariously to his eastern dominions. His Code entered Europe to possess it through the mediation of the universities and ecclesiastics of the Middle Ages (sec. 258).

217. **The Completed Roman Law: its Municipal Life.** — The body of law thus completed by sagacious practical adaptions, careful philosophical analysis and development, and final codification has furnished Europe, not with her political systems, but with her principles of private right. The *Corpus Juris* has been for later times a priceless mine of private law (secs. 258–267). The political fruits of Roman law — for it has had such — are seen in municipal organization. Though Rome suffered the towns in her provinces to retain their own plans of government, she of course kept an eye upon the management of their affairs, and her influence and interest were ever present to modify all forms and practices which did not square with her own methods. She besides dotted not only Italy, but the banks of the Rhine and other strategically important portions of her dominions with colonies of her own citizens, who either built fortress towns where there had before been no centred settlement at all, or sat themselves down in some existing native village. In both cases they of course imported Roman methods of city government. Everywhere, therefore, native towns were neighbors to Roman municipal

practice, and took yearly more color of Roman political habit from contact with it. By the time of the Teutonic invasions Western and Southern Europe abounded in municipalities of the strict Roman pattern.

218. **Diffusion and Influence of Roman Private Law.** — But private law was the great gift of the imperial codes. With the widening of the citizen right, the private law of Rome had spread to every province of the Empire. As it spread, it had been generalized to meet all the varied needs and circumstances of infinitely various populations, to fit all the trade and property relations of the vast Roman world, until it had become, as nearly as might be, of universal use and acceptability. It made wide and scientific provision for the establishment, recognition, and enforcement of individual rights and contract duties. It was incomparably more many-sided and adequate than anything the barbarian who disturbed for a time its supremacy could invent for himself: and it proved to have anticipated almost every legal need he was to feel in all but the last stages of his civil development. It was to be to him an exhaustless mine of suggestion at least, if not a definite store of ready-made law.

219. **Roman Legal Dominion in the Fifth Century.** — The invading hosts who came from across the Rhine in the fifth century of our era found Roman law and institutions everywhere in possession of the lands they conquered. Everywhere there were towns of the Roman pattern, and populations more or less completely under the dominion of Roman legal conceptions and practices. Their dealings with these institutions, the action and reaction upon one another of Roman law and Teutonic habit, constitute in no small part the history of government in the Middle Ages.

220. **Influence of Mosaic Institutions.** — It would be a mistake, however, to ascribe to Roman legal conceptions an undivided sway over the development of law and institutions during the Middle Ages. The Teuton came under the influence, not of Rome only, but also of Chris-

tianity; and through the Church there entered into Europe a potent leaven of Judaic thought. The laws of Moses as well as the laws of Rome contributed suggestion and impulse to the men and institutions which were to prepare the modern world; and if we could but have the eyes to see the subtle elements of thought which constitute the gross substance of our present habit, both as regards the sphere of private life, and as regards the action of the state, we should easily discover how very much besides religion we owe to the Jew.

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V.

TEUTONIC POLITY AND GOVERNMENT DURING THE MIDDLE AGES.

221. **Contact of the Teutonic Tribes with Rome.** — The Teutonic tribes which, in the fifth and following centuries, threw themselves into the Western Roman Empire to possess it were not all of them strangers to the polity which they overset. The Romans had often invaded Germany, and, although as often thrust out, had established a supremacy over the minds at least, if not over the liberties, of the Germans. Those tribes which had lived nearest the Rhine and the Danube, moreover, had long been in more or less constant contact with the masters of the Mediterranean and the western world, and had, of course, been deeply affected by the example of Roman civilization. Teutons had, besides, entered and, so to say, espoused the Roman world in great numbers, in search of individual adventure or advantage, long before the advent of the barbarians as armed and emigrant hosts. Rome had drawn some of her finest legions from these great races which she could not subdue. Her armies were in the later days of the Empire full of stalwart, fair-haired Germans.

222. **Primitive Teutonic Institutions.** — When Franks and Goths and Burgundians moved as militant races to the supplanting of Roman dominion, they, nevertheless, took with them into Western Europe, torn as it was by Roman dissensions and sapped by Roman decay, a fresh, unspoiled individuality of their own. They had their own original contribution to make to the history of institutions. Hitherto they had lived

under a system of government combining with singular completeness, though in somewhat crude forms, tribal unity and individual, or at least family, independence. Amongst them, as amongst other Aryan peoples, kinship constituted the basis of association and primal sanction of authority; and the family was the unit of government. Kinsmen, fellow-tribesmen, were grouped in villages, and each village maintained without question its privileges of self-government, legislating upon its common affairs and administering its common property in village-meeting. Its lands were the property, not of individuals, but of the community; but they were allotted in separate parcels to the freemen of the community, upon would-be equitable principles, to be cultivated for private, not for communal, profit. Chiefs there were who exercised magisterial powers, but these chiefs were elected in village-meeting. They did not determine the weightier questions of custom, in the administration of justice: that was the province of the village-meeting itself; and such judicial authority as they did exercise was shared by 'assessors' chosen from the whole body of their free fellow-villagers.

223. **Free, Unfree, and Noble.** — Not all their fellow-villagers were free. There were some who were excluded from political privilege and who held their lands only as serfs of the free men of the community; and there were others who were lower still in rank, who were simple slaves. There were, again, on the other hand, some who were more than free, who, for one reason or another, had risen to a recognized nobility of station, to a position of esteem and to an estate of wealth above those of the rest of the community. But nobility did not carry with it exceptional political privilege: it only assured a consideration which put its possessor in the way of winning the greater preferments of office in the gift of the village-meeting. The power of the noble depended upon the franchises of his community rather than upon any virtue in his own blood.

224. **Inter-communal Government.** — It was not often that a village stood apart in entire dissociation from all similar tribal or family centres; but when it did, the powers of its *moot* (meeting) extended beyond the choice of magistrates, the management of the communal property, and the administration of communal justice. It also declared war and appointed leaders of the communal 'host.' Commonly, however, these greater matters of war and of 'foreign relations' were determined by assemblies representing more than one village. Communities sent out offshoots which remained connected with them by federal bonds; or independent communities drew together into leagues; and it was the grand folk-moot of the confederated communities which summoned the 'host' and elected leaders, — which even chose the chiefs who were to preside over the administration of the several villages.

225. **Military Leadership: the Comitatus.** — The leaders selected to head the 'host' were generally men of tried powers who could inspire confidence and kindle emulation in their followers; and such men, though chosen to official leadership always only for a single campaign, never even in times of peace ceased to be, potentially at least, the heads of military enterprise and daring adventure. Not uncommonly they would break the monotony of peace and dull inactivity by gathering about them a band of volunteers and setting forth, spite of the peace enjoyed by their tribe, to make fighting or find plunder somewhere for their own sakes. About men of this stamp there gathered generally all the young blades of the tribe who thirsted for excitement or adventure, or who aspired to gain proficiency in arms. These became the military household, the *comitatus*, of their chosen chieftain, his permanent, inseparable retinue, bound to him by the closest ties of personal allegiance, sitting always at his table, and at once defending his person and emulating his prowess in battle; a band who looked to him for their sustenance, their military equipment, and their rewards for valor, but who rendered him in return a gallant

service which added much to his social consideration and gave him rank among the most powerful of his fellow-tribesmen.

226. **Contrasts between the Teutonic System and the Roman.** — These features of tribal confederation and personal supremacy, though suggestive at many points of the primitive Roman state, were in strong contrast with the Roman polity as it existed at the time of the invasions. They were not only more primitive and so indicative of a very much less advanced stage of civilization, but they also contained certain principles which were in radical contradiction to some of the conceptions most fundamental to Roman state life.

227. **Roman Allegiance to the State.** — The central contrast between the two systems may be roughly summed up in the statement that the Teutonic was essentially *personal*, the Roman essentially impersonal. Neither the Roman soldier nor the Roman citizen knew anything of the personal allegiance which was the chief amalgam of primitive German politics. His subordination was to the state, and that subordination was so complete that, as I have previously said, he was practically merged in the state, possessing no rights but those of a child of the body politic. His obligation to obey the magistrate in the city or his commander in the field lasted only so long as the magistrate's or commander's commission lasted. Allegiance had no connection with the magistrate or the commander as a person: magistrate and commander claimed allegiance only as representatives of the state, its temporary embodiment. To them, *as the state*, the citizen or soldier owed the yielding of everything, even of life itself: for as against the state the Roman had no private rights. While he held office, therefore, magistrate or commander was omnipotent; his official conduct could be called in question only after his term of office was at an end and he had ceased to be the state's self. Of course much decay had come into the heart of such principles ere the Empire was forced to break before the barbarian; but they never ceased to be central to Roman political conception.

228. **Teutonic Personal Allegiance.** — With the Teutons, on the contrary, political association manifested an irresistible tendency towards just the opposite principles. When they came to their final triumph over the Empire they came ranked and associated upon grounds of personal allegiance. In their old life in Germany, as we have seen (sec. 225), their relations to their commanders did not cease at the close of a war sanctioned by the community, though the commission of their leaders did expire then. Many — and those the bravest and best — remained members of their leader's *comitatus*, bound to him by no public command or sanction at all, but only by his personal supremacy over them. They even made themselves members of his household, depended upon the bounties of his favor, and constituted themselves a personal following of their chosen leader such as no Roman but a fawning client would have deigned to belong to. It was a polity of individualism which presented many striking points of surprise to Roman observers. Individuals had under such a system a freedom of origination and a separateness of unofficial personal weight which to the Roman were altogether singular and in large part repugnant.

229. **Temporary Coexistence of the Two Systems.** — For the first two or three centuries of the Teutonic dominion over the Romanized populations of their new territories Teutonic and Roman institutions lived side by side, each set persistent for its own people. The Germans did not try to eradicate either the old population or the old laws of the Empire. They simply carried into the midst of the Empire their own customs, which they kept for themselves, without thrusting them upon their new subjects. They appropriated to their own uses large tracts of its lands, either casting out those who already occupied them or reducing the occupiers to a servile condition; but leaving much of the land untouched, to be occupied as before. Of course Teutonic customs, being the customs of the dominant race, more and more affected the older Roman rights, even if only insensibly; and Roman principles of right, belonging as

they did to a much superior and much more highly developed civilization, which the Teuton had already long reverenced, must have had quite as great a modifying effect upon the Teutonic customs, which now, so to say, lay alongside of them. The Roman polity had entered into the whole habit of the provincials and still retained, despite the disorders of the later days of the Empire, not a little of its old vigor and potency. It had strongly affected the imaginations of the Germans when they had touched only its geographical borders, and it did not fail in a certain measure to dominate them even now, when it was at their feet. They made no attempt to stamp it out. They, on the contrary, tolerated, respected, imitated it.

230. **Relative Influence of the Two Systems.** — So far as any general description of this mixture of Roman and Teutonic influences may be ventured, it may be said that the Teutonic had their greatest weight on the side of political organization, the Roman on the side of the development of private rights. The Teutons, of course, tried to reproduce in their new settlements the communal life peculiar to their own native institutions; they endeavored to organize their own power, according to the immemorial fashion of their own politics, on the basis of a freehold tenure of the land and local self-administration, — a free division of the spoils on the ground of individual equality among the freemen of the tribes. They had stamped out the Roman *state* in the invaded territory; Roman *public* law they had of course displaced, destroyed. It was Roman conceptions as to private relations that gradually modified their Teutonic system. That system rested, as regarded its political features hardly less than at all other points, upon the relations of individual to individual, and as the example of the Roman practices, still preserved by the conquered populations about them, modified these relations of individual to individual, great changes were by consequence inevitably wrought in political organization as well. Such changes were, however, not in the direction of a reproduction of Roman political method, but in

the direction of the creation of that singular public polity which we designate as *mediæval.*

231. **Roman Influence upon Private Law.** — The Roman influence exerted itself most directly and most powerfully, then, through the medium of Roman Private Law. That law had developed too perfect and complete a system of private rights to fail of acceptance at the hands of the new organizers. The Teutonic leaders were, moreover, prepared to admire and heed Roman civil arrangements. Accordingly the sixth century has scarcely opened before we find Alaric II., king of the West Goths (506 A.D.), and Sigismund, king of the Burgundians (517 A.D.), compiling, from the code of Theodosius and the writings of Gaius and Paulus, compends of Roman law for the use of their Roman subjects. Even in the north of Gaul, in the districts which had been somewhat remote from the Roman influence, the Franks were constrained, while rejecting Roman law for themselves, to suffer it to retain its validity for their Gallic subjects. The result was the rise in Northern Gaul of a curious and anomalous system of 'personal law.' There was one law for the Gaul, another for the Frank. Even as between Frank and Frank there was a difference of law. The Salian Frank was not judged by the same rules as those which bound the Ripuarian Frank, but for each there was a law of his own. Sometimes, in a suit, it was the plaintiff, sometimes the defendant, who established a right under his personal law. Even Charles the Great did not stamp out these confusing practices, though he sought to give Roman law anew to his empire through a fresh issue of the code of Alaric.

232. **Roman Towns.** — It was in the towns that the law of Rome had its strongholds. There it had a centred and lively influence: and there it was long undisturbed by the conquerors. It took the Teuton a long time to learn how to live in a town, within limiting walls and amidst crowded houses. His native habit called him to a freer life: the pent-up town was too rigid, too conventional, too narrow a sphere for his restless energies.

He at first contented himself, therefore, with the mere formal submission of the towns: it was long before he entered them to stay and to take part in their life. Meanwhile not only Roman private law, but also Roman municipal traditions, were preparing the cities for the power and independence which they were to claim and enjoy during the Middle Ages. They were to prove Rome's most vital fragments. They nursed her law and reproduced her politics. Not Italy only, but the Rhone and Rhine countries as well, were dotted over with these abiding-places of the old influences which had once dominated the world: and from them those influences were eventually to issue forth again to fresh triumphs.

233. **The Fusion of the Two Systems.** — Gradually there was brought about that fusion of German customs with Roman law and conception which, after a long intermediate fermentation, was to produce the conditions of modern political life. During the Middle Ages government gradually worked its way out from the individualism inherent in the habits of the Germanic races back into an absolutism not unlike that of the Roman Empire. The intermediate stage was *Feudalism*.

234. **Effects of Movements of Conquest upon Teutonic Institutions.** — Feudalism was preceded, however, by modifications in the Teutonic system which were not the result of their contact with Romanized peoples, but the direct effects of conquest.

235. (1) **The New Kingship.** — The migratory conquests of the Teutons greatly emphasized for a time the principle of individualism, — the principle of personal allegiance. They advanced to their new seats not as separate marauding bands, but as emigrant nations. It was a movement of rāces, not of armies merely. All the freemen of the tribes came, bringing with them their families, their household goods, and their slaves, as having come to stay. But they could not preserve, when on such an errand, the organization of times of settlement and peace. They were forced to elevate the commander of the

host to a new kingship. As confederated tribes in their old seats they had often chosen kings, who typified in their official dignity and sanctity the unity of tribal organization, who presided over the national councils, and who by reason of their preferred position enjoyed a somewhat greater state than their noble associates in the tribes. But these early kings, like the Greek kings of the Homeric songs, were scarcely more than patriarchal presidents, 'first among peers.' The later kings, in Gaul, in England, and in Spain, — the kings of the emigration, — on the other hand, ruled as well as reigned. They had first of all been the leaders who commanded the invading hosts, and who had met and routed the Roman forces who would have withstood the stalwart immigrants; and so long as conquests remained incomplete, they continued in command to complete them. Conquest being achieved, their authority was still necessary to keep their people together in dominant organization. It was only the logical and inevitable result that was reached, therefore, when they became possessed of sovereign powers of a sort such as German politics had never known before.

But, great as was the almost immediate transformation of commanders into kings, they were not yet kings such as later times were to see in France, after feudalism should have worked its perfect work.

236. (2) **The Modified Land Tenure.** — The invading peoples doubtless at first took possession of the conquered territory by a tenure not radically different from that by which they had held their older home fields, except as it was modified by the fact that the conquered lands were already occupied by a native population, whom it was not their policy altogether to dispossess, and whose presence even as serfs would necessarily affect the system of the new masters. Those who were suffered to retain their holdings only exchanged a Roman overlordship for a German; but they constituted a new class of citizens in the German polity, and, of course, touched with Roman influences Teutonic customs of tenure.

237. It was the circumstances of conquest, however, which were the chief causes of modification. The conquered territory was naturally disposed of, in large part at least, by the leaders of conquest in accordance with military and strategic requirements. Such leaders, too, always get the lion's share of property won, as these lands had been, by arms; and, by their gifts, their chief followers also are made specially rich in the new lands. Thus a new bond of personal connection is created, and conditions pregnant with profound social changes are established. It was by means of such gifts and their influence that the leaders of conquest raised up about them proprietors all but as powerful as themselves, and so both cheated themselves of full kingship, and robbed society of all chance of harmonious unity. Power fell apart into fragments, — into a vast number of petty lordships, and the Feudal System was born.

238. **The Feudal System.** — Feudalism is the name given to that stage of growth through which Teutonic institutions passed while accommodating themselves to new rootage in Roman territory and to the new conditions created by race migrations and conquests. It was, in its highest development, a system of parcelled lordship and divided authority, based not upon general political law, but upon property in land. The two chief constituent forces of this new system were '*commendation*' and the '*benefice.*' A 'benefice' was a landed estate held upon conditions of service to some superior, the real or feigned giver of the estate. 'Commendation' was a ceremony by which a similar obligation of personal fealty towards a superior was created, whether land was held by his gift or not. The result of both was to create a series of personal dependencies: a connected series of greater and lesser landowners, the less dependent on the greater, and all at least nominally dependent on a king, the centre and titular head of the hierarchy.

239. **Local Differences in Feudal Development.** — There was, of course, not exactly the same method of development

everywhere. In England, under the Saxons, and afterwards under their cousin Danes, the new polity was held together primarily and principally by that old cement of personal allegiance, the relations of leader and *comitatus* (secs. 225, 228); in France, and elsewhere on the continent, it was generated more directly by *territorial* connections independent of leadership and following. In the one case men owned land and possessed power because of their personal relations with the king; in the other, they stood in special personal relations to the king because they owned land of which circumstances had made him titular overlord. Speaking generally, so as to include both France and England, it may be said that the benefice was of two kinds. The English benefices were most often estates granted by the king to his personal following, to his *comites*, or to his less independent adherents, on condition that they should hold themselves ever ready to render him full aid and service, and ever continue to adhere to him with special fidelity. The French benefices were more generally estates originally *allodial* (that is, held under no one, but by an independent title), which had been surrendered to the king, or to some other lord of the new hierarchy, to be received back again as his gift, for the sake of the mutual obligations of faith and support thus established. Of course it is not to be understood that benefices were exclusively of the one kind in England, and exclusively of the other kind in France. In France such estates were very often direct gifts from the king or another superior; and in England they were as often surrendered freeholds not rewarding gifts. But each country had its predominant type of the benefice. Its common mark everywhere was that it was a landed estate; not an office or any other gift, but land held upon conditions of fealty to a superior.

240. **Commendation,** on the other hand, had no necessary connection with land. Its predominant feature was a personal relationship which was rather that of master and man than that of landlord and tenant. It seems to have been made

necessary by the creation of benefices. As great properties grew up about them, as they became encompassed by the great network of connected estates woven out of the principle of the benefice, small landholders found it necessary to avoid collision with the growing power of their princely neighbors by throwing themselves into the arms of that power, by hastening to conform and make of their own holdings benefices held of the lord of the greatest contiguous manor, and as society fell thus into regular gradations of personal allegiance based upon property, the free man who was without property and the native of the conquered territory who found himself suffered to have liberty but not to hold land by any such tenure as would enable him to become a '*beneficiary*,' were both left without a place in the new social order. Owing no definite service to the powerful persons about them, they could claim no protection from them. They could be oppressed without remedy. They were driven, therefore, to '*commend*' themselves to some lord who could afford them security — such security at least as the times permitted — in return for fealty. This was 'commendation.' It had, as I have said, no *necessary* connection with the land, though the small owner as well as the landless person probably became his lord's 'man' rather by commendation than by benefice. It became a universally recognized maxim of law that 'every man must have his lord.' Whether through benefice or through commendation, he must fall into definite place in the minutely assorted and classified society of feudalism.

241. **Political Disintegration.** — The state was thus disintegrated. It no longer acted as a whole, but in semi-independent parts. There was no longer any central authority which acted directly upon all individuals alike throughout a common territory. The king controlled directly, as he had the power, only the greater lords, who were in feudal theory his immediate vassals; other men, lower down in the series, could be reached from above only through *their* immediate

masters. Authority filtered down to the lower grades of society through the higher. It was a system, not of general obedience to a common law, but of personal obedience and subordination founded upon land-ownership.

242. Such, then, was the Feudal System. The king had no immediate subjects except the greater barons and the vassals on his own baronial estates, and the greater barons were obedient subjects only when he had armed power sufficient to compel them to obey. Their vassals served the king only when they themselves did, and because they did, arming themselves for the king, as they would arm themselves against him, only as their lords commanded. In brief, every baron was himself practically king of those holding under him. It was his decree that sent them into the field; it was his power that defended them against other lords who would have oppressed or plundered them; and it was in his courts that justice was administered between them. His strength and favor were their shield and title. Law indeed grew up in the shape of custom; but the customs of one barony differed from those of another. Except in so far as the priest and the lawyer revived, in their advice to the magnates who consulted them, the principles of the Roman law, still alive to the studies even of that time, no uniformity of practice prepared a unified system of law for the realm. It was an arrangement of governments within governments, a loosely confederated group of inharmonious petty kingdoms.

243. **The Feudal Conception of Sovereignty.** — The most notable feature of feudalism is that in its system sovereignty has become identified with *ownership*. The rights exercised by the barons were in many cases nothing less than sovereign. Not only did they decide property titles by the custom of their baronies and private rights by laws determined in their own courts, they often also coined money, they constantly levied tolls upon commerce, and they habitually made war when they pleased upon rival neighbors. They gathered about

them, too, as the king did about himself, an immediate following of *knights*, whom they endowed with lands as, so to say, barons of these lesser kingdoms, the greater baronies. They commanded this retinue and exercised these sovereign powers, moreover, because of their relations as owners to the lands and tenantry of their domains. Sovereignty, in this petty parcelled kind, had become a private hereditary possession, an item in family assets. Whoever should be able to accumulate these territorial lordships into one really great kingship would be owner, and, as owner, sovereign of the realm (sec. 253).

244. **Feudalism and the Towns.** — The towns, meantime, stood out with not a little success against feudalization. Many a town was, indeed, dominated by the threatening pile of some baronial castle, built over against it on the strategic vantage-ground of hill-summit or river peninsula; and all were constrained sooner or later to yield at least nominal overlordship to some feudal superior. But in the most important and powerful burgs enough of the old municipal organization and independence was preserved to transmit to the times which witnessed the downfall of feudalism at least a vivid memory of the antique communal life in which society had found its first, and up to that time its best, vigor. They kept alive if it were only a tradition, yet a fecundating tradition, of that true conception of political authority which made of it, not a piece of private property to be bartered or sold, but the organized, the uttered will of a community.

245. **The Guilds.** — Still, within the cities there early sprang up a semi-feudal organization of society altogether their own. The importance of a town rested, of course, not upon the ownership of lands, though many towns did own not a little land, but upon wealth gained by trade and industry. The internal social organization of the towns, therefore, tended more and more to turn upon the relations of labor. The famous *guild* system sprang into existence. Every handicraftsman,

every trader, — like every landowner and every freeman in the society outside the towns, — had to find his place in a sharply differentiated social classification. Each occupation was controlled by its guild; and that guild was a close corporation, admitting to membership only whom it chose. No one could enter save through the stringently guarded avenues of a limited and prescribed apprenticeship; and once in, the apprentice was bound by the rules of the order. City government became representative of the authority of associated guilds. No one was a citizen who was not within one of the privileged associations. It is a reminiscence of this old order of things that the building about which the city government of London, as of many other antique towns, still centres is known as the 'Guild-hall.' Even the militia of the towns were trainbands from the several guilds. The town, also, had created its 'estates,' its orders, as the country had done. This was its feudal system.

246. **The City Leagues.** — The greater trading towns near the Baltic and along the Rhine took advantage, during the thirteenth century, of the opportunities for independent action afforded them by the piecemeal condition of authority under the feudal system to draw together into leagues, the better to pursue their own objects; and for a very long time these leagues exercised the powers of great states, making war and peace, levying custom, concluding treaties and alliances. Their primary object was to cure those disorders of the times which made the roads unsafe and so interfered with their trade. The greatest of these leagues were the *Hansa*, more commonly known in English writings as the Hanseatic (*Hansa* means trade-guild), and the *Rhenish*. The former centred about the great cities of Lübeck and Hamburg, and at one time included ninety of the towns lying between the Baltic and the Elbe. The latter had Worms and Mainz as its leaders, and at one time or another had connections with seventy towns, some of which stood as far away from the Rhine as Bremen and Nuremberg, though the arteries of trade which it was meant to protect and keep

open lay chiefly along the Rhine valley. Many great princes were constrained to connect themselves with these leagues in the heyday of their power. But trade alliances afforded too many occasions for jealous discords, and the growth of vast territorial monarchies too dangerous rivalries for the cities; and their leagues were eventually broken up.

247. **Unifying Influences.** — Two unifying influences operated more or less potently during the Middle Ages to counteract the disintegrating tendencies of the feudal system. These were the *Roman Catholic Church* and the *Holy Roman Empire.* Both the Church and the Empire may be said to have been shadows of imperial Rome. They were, by intention at least, the temporal and spiritual halves of the old empire of the Cæsars.

248. (1) **The Roman Catholic Church** had, historically, a real connection with the veritable dominion of Rome. Before the Empire had been shattered by the onset of Teutons and Turks, Christianity had become its recognized official religion. The Pope in Rome represented one of the great primacies which had early grown up within the imperial Church: and this Church of the West, sundered from the Church of the East by then irreconcilable differences of doctrine, showed an instinct for conquest which seemed a direct heritage from the great pagan Rome of the olden time. She mastered the new masters, the Teutons, and everywhere insinuated herself into the new political system which developed under their hand. Not only had every castle its chaplain, every city and countryside its priest, but the greater ecclesiastics themselves became feudal lords, masters of baronies, members alike of the civil and the religious hierarchies; and even monasteries owned vast estates which were parcelled out upon a feudal tenure.

249. But, for all it was so interwoven with the feudal system, the Church retained its internal unity. The Pope's power did not fall apart as did the king's. The priest acknowledged in all things his allegiance to a universal kingdom, the spiritual

kingdom of the Church of Rome. That Church recognized no boundaries, whether of baronies or of states, as limits to her own spiritual sovereignty. That extended, as she claimed, over all kings of whatsoever grade, over all men of whatsoever rank or estate. The silent, unarmed forces of her influence, therefore, stood always on the side of an ideal unity. And they certainly retarded disintegration. Her lesson was brotherhood and a common subjection; and that lesson, though often neglected, was never utterly lost sight of or forgotten. She kept alive, moreover, in her canon law, much of the civil law of Rome: *her* laws at any rate were not diverse, but always the same; they reached the people and the conceptions of the time through the administration not only of her ecclesiastical courts, but also, indirectly, no doubt through the judgments of the baronial courts of the baron-bishops: and whatever tended to unify law tended to unify politics. The ecclesiastical power was always on the side of any good Catholic who proved himself capable of creating larger wholes of political authority, larger areas of civil unity. By precept and by example the Church was imperial.

250. (2) **The Holy Roman Empire.** — Under the direct descendants of Chlodwig, the once vast dominions of the Franks fell asunder in several pieces; but Charles the Great (768–814) reunited and even extended them. He brought together under his sword the territory now included in Germany, Switzerland, Hungary, Italy (all save the southernmost part), France, and Belgium. And neither any Teuton nor any successor of Teutons in Western Europe ever gathered wide territories under his sway without dreaming of restoring the Roman Empire and himself ascending the throne of the Cæsars. From Charles the Great to Napoleon the spell of the Roman example has bound the imagination of every European conqueror. Charles had this ambition clearly in his view, and circumstances peculiarly favored its realization. At the same time that he reached the height of his power, Rome reached

the acme of her discontent with what she considered the heresies of the Eastern See, and the political disorders at Constantinople gave the Roman pontiff pretext for casting finally loose from all Eastern connections. The Empress Irene deposed her son and usurped his throne; the Italians declared that no woman could succeed to the titles of the Cæsars; and the Pope, arrogating to himself the prerogatives of king-maker, crowned Charles the Great emperor of the Holy Roman Empire, — 'Holy' because created by the authority of mother Church.

251. Here was a real 'Western Empire'; the first had been only an administrative half of the once undivided dominions of the emperors. Charles gave to his empire real vitality while he lived; he, moreover, did what he could to hasten civil unity by promulgating anew the Visigothic version of the Roman law (sec. 231); and, although his empire broke up upon his death, an almost uninterrupted line of emperors, of one great feudal house or another, carried the titles of Rome through the Middle Ages to modern times, now and again backing them with real power and always preserving for Germany a shadow at least of unity in a time of real disintegration. Believing themselves, besides, in the early times at any rate, the lineal and legitimate successors of the Cæsars, there was special reason why every emperor should continue to build, so far as he had the opportunity, as Charles the Great had begun to build, on the law of Rome as a foundation, never designedly, as Charles the Bald declared, enacting anything repugnant to it. All who from time to time drew to the side of the imperial power in the conflicts of disordered ages also naturally affected the language and principles of the same system. The Empire was, therefore, not only sometimes a silent witness and sometimes a great power for unification, but also always a steady influence on the side of a system of law more advanced and unifying than that of feudalism.

252. **Centralizing Forces: the Carolingians.** — The rise of the family of Charles the Great into power illustrates the

character of the chief, indeed the only potent, centralizing forces of the feudal time. Those forces lay in the ambition of great barons. Under the descendants of Chlodwig (the Merowingians) the territory of the Franks tended more and more to become permanently divided into two distinct parts. There were often, it is true, more parts than two: for it was the Frankish custom to divide even a royal inheritance between all the sons of a deceased possessor. But, as it fell out in the long run, the most permanent division was that between Neustria (the western half) and Austrasia (the eastern). In both of these kingdoms the Merowingian rulers soon degenerated into mere shadows of their imperative, dominant ancestors; and they were presently displaced by a powerful family of Austrasia, the family of Charles Martel. Charles Martel was Mayor of the Palace under the Austrasian branch of the royal family. The office of Mayor of the Palace, though an office in the king's household, was, it would seem, filled rather by dictation of the powerful lords of the kingdom than by a free royal choice. It was filled, consequently, at any rate in the times of which I am now speaking, by the leader of the great territorial chiefs, by the leader, that is, of the king's rivals in power. It had indeed become an hereditary office held by the greatest of the baronial families. Charles Martel was a soldier of genius: he handed his office on to his son and his grandson: they were men abler than he. His son, Pepin, with the sanction of the Pope, whom he had greatly served, became king of the Franks, in name as well as in reality, to the final ousting of the old line of 'do-nothing' monarchs; and his grandson was Charles the Great.

253. **The Capets: Concentration of Feudal Power.** — In the tenth century a similar change was wrought in France. The descendants of Charles Martel (Carolingians) had in their turn lost vigor and become unfit for power. They were displaced, therefore, in the western half of their dominions (in Neustria) by a family of warriors whom they had endowed first with the

county of Paris, and afterwards with the duchy of France, as at once a reward for their services in withstanding the incursions of the Northmen and a stake in the threatened territory. The duchy of France was only a comparatively small district about Paris; but the vigor and capacity of the Capets, its dukes, speedily made it one of the most important feudal properties in the whole of the great territory to which it was eventually to give its name. They became the chiefs of the baronial party, and when discontent with the Carling kings culminated, it was they who became first 'kings of the barons,' and finally kings of France. Refusing to degenerate, as the Merowingian and Carolingian princes had degenerated, they continued to develop, generation after generation, a kingdom destined one day to rank with the greatest of Europe; and that by a process planned as if meant to illustrate how best the feudal system might be used for its own destruction. By every means — by war, by marriage, by contract, by stratagem, by fraud — they drew all the greater feudal sovereignties into their own possession, until at length, their duchy of France and the kingdom of France were indeed identical; until, having absorbed all scattered authorities, they had made sovereignty, once possessed privately in sundered pieces, once more a whole, — but a whole which, by the strict logic of feudalism, was their private estate; until they almost literally possessed the land, and Louis XIV. could say with little exaggeration, '*L'état c'est moi.*' They had gathered the fragments of the feudal system into a single hand, and had made the state itself a feudal possession, a family estate.

254. **The Piecing together of Austria and Prussia.** — Later still the same process was repeated in Prussia and in Austria. By conquest, inheritance, forfeiture, marriage, contract, fraud, powerful feudal families pieced together those great kingdoms, to become in after times the bases of national organization. In neither Prussia nor Austria did the process go so far as in France, though Austria, under the great house of Habsburg,

became possessor of the imperial throne of the Holy Roman Empire, and Prussia, under the equally great house of Hohenzollern, has become the central and dominant state of a new German Empire, which, through the healthful processes of modern national life, if not through the happily obsolete forces of absolutism, may yet be as truly compact and unified a kingdom as any the world has seen.

Roman Law in Modern Legal Systems.

255. From the fifth to the twelfth centuries Roman law inhered in the confused civil methods of the times for the most part as a mere unsystematized miscellany of rules applicable to the descendants of the Roman provincials and observed largely within the towns. As the old distinctions between Roman and Teuton faded away, however, in the gradual mixture of the populations, these rules entered more and more into the general mass of common custom. This process was in great part unconscious; there was no scientific selection in the development.

256. **The Barbaric Codes.** — It was not from mere tradition, however, — not simply from Roman law transmuted into unrecorded provincial custom, — that the knowledge of these centuries concerning the civil law of the Empire was derived, but from the Theodosian legislation and the writings of the jurists as they appeared in the Code of Alaric II. (sec. 231), which is known to quotation as the Breviary (*brevarium Alaricianum*). The West Goths themselves had not long remained contented with that compend of the law. In the seventh century there had been prepared in Spain a new *Lex Visigothorum* which contained a summary, not of Roman rules only, but of Gothic custom as well, and which, superseding the earlier compilation of Alaric, formed the basis for later codifications of Spanish law. But the south of France, which had once owned the dominion of the Visigoth, retained the Code of Alaric; it was trans-

mitted thence to the north of France, to be handed on to Germany and England; and for all of these countries it continued to be the chief, if not the only source of Roman law until the eleventh or twelfth century. Charles the Great, as I have said, republished it, accepting it as the recognized manual of Roman legal principle. Even Italy had had the continuity of her legal tradition broken by barbarian invasion, — especially by the inroad of the raw Lombards, — and had had to keep the fragments together as best she might amidst just such a confusion of 'personal' laws as prevailed elsewhere in the once Roman world (sec. 231).

257. **Custom and Written Law in France.** — It was at this time that the north and south of France came to be distinguished as respectively the 'country of custom' (*pays de coutume*) and the 'country of written law' (*pays de droit écrit*). In the south, which had been thoroughly Romanized for centuries, there was the written law of Rome; in the north, which had never been so thoroughly Romanized, and which was now quite thoroughly Germanized, there reigned in unrestrained confusion the Teutonic customs of the barbarian masters.

This division corresponded closely with the division between the *langue d'oc* and the *langue d'oil*. The districts of the *langue d'oil* (of the Frankized Latin) were the country of custom; the districts of the *langue d'oc*, the country of written law.

258. **The Study of the Roman Law.** — But in the twelfth century the law of Rome fell upon the good fortune of being systematically studied once more by competent scholars, and once more cultivated by scientific lawyers. And not the Code of Alaric, but the vastly more perfect *Corpus Juris Civilis*, as the twelfth century called it, Justinian's (or, rather, Trebonian's) great compilation, which Germanized Europe had hitherto used scarcely at all,[1] was the basis of the revived

[1] The Digest and the Codex were in some measure made use of by the canonists throughout the Dark Ages.

study. The new cultivation of the law began, naturally and properly enough, in Italy. The University of Bologna rose into prominence and became famous as the chief seat of the study of the Roman code. Pisa and other Italian schools then took up the new pursuit. Presently the interest had spread to France and to Spain, going in France first to Montpellier and Paris, afterwards to Bourges, Orléans, and Toulouse, the old capital of the West Goths; and in Spain creating (A.D. 1254) the notable University of Salamanca. From Spain and France, Holland caught the fashion, giving to Europe in the seventeenth century the illustrious jurist Hugo Grotius, who created out of the great principles of equity discoverable in Roman Law the elevated and influential science of International Law (sec. 1216). In England, too, the same studies began to be affected almost immediately after the rise of the school of Bologna, and are said to have been regularly pursued there down to the sixteenth century.

259. **Entrance of Roman Law into the Legal Systems of Europe.** — Of course this widespread interest in the study of Roman law was not all speculative. The study and the practice of the law acted and reacted on one another. Its rules were more and more consciously and skilfully fitted into the growing law of the kingdoms which were emerging from the feudal system because it was being adequately mastered and systematized at the universities; and it was being mastered and systematized at the universities because it was being more and more called for in the actual administration of justice. Its use and its cultivation went hand in hand.

260. **In France** Louis IX. (1226–1270) ordered the Roman law to be translated into French, and, by the judicial reforms which he instituted (sec. 296) illustrated the history that law was to have in the kingdom of the Capets. Roman law came into use in France with much the same pace with which the Capets advanced to complete power, and triumphed with the perfecting of the centralization which they effected. Louis

IX. established the right of the crown to hear appeals from the feudal courts in all cases; he sent royal judges on circuit to hear complaints of infringed rights; and at Paris he erected the famous *Parliament of Paris* as the supreme tribunal of the realm. The feudal lords of France were the nominal members of this court, but trained jurists (*legistes*), appointed as experts to assist them, became in practice its real members. Schooled in the Roman law, they admitted its principles into all their decisions; and they gave to the king from the same source the maxim which declared the will of the prince to be law. As the king's jurisdiction grew, the principles of Roman jurisprudence gained wider and wider acceptance and supremacy.

261. And presently the Roman law came, so to say, from out the nation to meet the royal system. Very early in Berri, Bourbonnais, and Auvergne, the central districts of France, the law of Rome had been adopted as the common law of the land, to be appealed to in the absence of proof of any special custom or enactment. Subsequently it came to be considered as in some sort the supplementary common law of all France, for, though never established as such in the north of France, it was even there appealed to in doubtful cases as 'written reason.' The *Code Napoléon*, the last great codification of French law, has been described as in great part a republication of the laws of Justinian as those laws have been modified and fitted to new circumstances by the processes of French history. The statement ought, however, to be taken with an important qualification. A very great deal of Germanic law found permanent place among accepted legal principles in France, though Roman law contributed the chief formative forces, the forces of fusion and system.

262. **Local Custom in France.** — It is important to observe, however, that the unifying, harmonizing influences exercised by the growing royal jurisdiction were, for a long time at any rate, influences which affected *procedure* rather than the internal, essential elements of legal principle. The differentia-

tion between district and district which had taken place in the process of feudalization had been of the sharpest, most decided character. When the Capets first assumed the titles of kingship there were as great duchies as France. The work of extending and consolidating the kingdom consumed several centuries; and, meanwhile, each petty sovereignty was developing its own law apart. Much of the territory which afterwards became part of France was, during the same period, moreover, in foreign hands, held by England or Burgundy. The kingdom as finally consolidated, therefore, presented a very great variety of deeply rooted and persistent local laws and customs. Normandy had one set of customs, Berri a very different set, Anjou a third, Brittany a fourth; and so throughout the once piecemeal country.

263. **Unifying Influence of the Royal Prerogative.** — The influence of the royal jurisdiction upon this heterogeneous mass of differing laws was, as I have said, at first rather to unify and systematize the procedure of the local courts which administered local law in semi-independence than to effect changes in the customs themselves. Since appeals to the king's justice were possible in all cases, the formal method of appeal tended to become the same everywhere; and the methods of the king's courts in dealing with appealed cases of course more and more tended to set the fashion of procedure throughout the loose system, though the royal judges continued to decide appealed cases according to the law of the district from which they were brought up.

264. By degrees, however, new ideas and principles, as well as new modes of procedure and appeal, were infused into local justice. The law and the legal practice of each district alike more and more distinctly and consciously approximated to the models of organization and to the standards of decision obtaining in the king's courts. The territorial tribunals accepted the services of lawyers trained in Roman principles and inclined towards regal precedents; and the local law officers of

the crown were of course everywhere ready to effect whatever was within reach of their functions or example in the way of bringing local custom around to the rules of universal acceptance to be found in Roman law and regal decision. Independently, too, of the influence of the crown the Roman law was entering the local courts, becoming common law in Auvergne and Bourbonnais, as we have seen, before it became the common law of France.

265. Through *the Parliament of Paris* (secs. 293, 298) the Roman law had, so to say, a double door of entrance. The jurisdiction of that court was both spiritual and temporal: so that both the Code of Justinian and the canons of the Church contributed their versions of Roman judicial practice and tradition to its findings.

266. **In Germany,** as in France, the influence of the Roman law has attended the progress of the forces of unification. The Romans had never established their power beyond the Rhine. There, after the movements of the Teutonic tribes in the fifth and following centuries, as before, Germanic custom had almost undisputed mastery. The feudal system, moreover, left its work in more complete crystallization in Germany than elsewhere: for Germany emerged from the Middle Ages what she still is in great part, namely, a mere congeries of petty states. Still the Holy Roman Empire, however shadowy it became at times, had been created in Germany with the distinct idea of a title derived directly from Rome; and throughout all the changes of German history the imperial influence has sheltered and fostered Roman law. The imperial courts, the imperial lawyers, the imperial party in general, were always administrators or advocates of its principles. When the house of Habsburg came to possess the Empire, as when other powerful emperors had reigned (secs. 370, 374 *et seq.*), there was no small potency in these influences. More and more pervasive became the great irresistible system of law; everywhere, without displacing, it instructed, supplemented,

moulded Germanic custom, until now its presence in both national and local law has made it the basis of all legal study in Germany, and the *Corpus Juris* is a 'subsidiary authority' in almost all courts. To a certain extent Roman law was suffered even to displace Germanic custom. Very early the courts, while accepting Roman legal rules as *prima facie* conclusive of the rights of a suitor, imposed upon those who alleged established local usage in opposition to it the necessity of furnishing conclusive proof of the existence and acceptance of such usage as law. Roman law, in brief, they accepted, so to say, on its own authority, Germanic custom only on the authority of indubitable testimony. The German universities now furnish the world with Roman lawyers greater than those which once came forth from Bologna and Paris and Leyden.

267. **In England** the Roman law has had a more obscure but hardly a less interesting history. The Romans governed Britain four hundred years, bending the province to the purposes of their administration with their usual thoroughness. We know that Papinian, the greatest of Rome's jurists, himself administered the law in Britain, and we have every reason to believe that its promulgation there was thorough, its rootage full four hundred years deep. It can hardly be that the Saxons wholly eradicated it. We know that many Roman municipalities on the island survived all conquests: and we know that the priests of the Church of Rome early took back to Englished Britain conceptions steeped in Roman jurisprudence. Bede testifies that the Saxon laws were codified under the auspices of the clergy and that Roman codification was the model. We have seen that Roman law was studied in England almost as early as in mediæval Italy herself, the study being continued without serious break for more than three centuries (sec. 258); and the works of the earliest English legal text-writers, such as Bracton, Glanvil, and the author of the *Fleta*, abound in tokens of a close familiarity with the laws of the imperial codes, are full of

their very phraseology indeed. The laws of Henry I. are said by competent legal scholars to consist, to the extent of fully one-half their content, of precepts borrowed from Rome. Through the ecclesiastical courts, which down to the middle of the present century administered upon all estates in England, and upon all trusts; through the Court of Chancery, whence has issued the system of English equity, and which was presided over in its formative period by the great ecclesiastics who were the first Chancellors, afterwards by lawyers, such as Lord Mansfield, deeply versed in the civil law of Rome and apt to draw suggestion and even concrete rule from it; and through the Admiralty Courts, always controlled by the rules of the Civil Law, England has drawn so copiously from Roman sources, in supplement of her own indigenous Germanic customs, that only that portion of her law which relates to the holding of real property has escaped being very deeply marked by the same influences that have moulded all the law of the rest of Europe.

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VI.

THE GOVERNMENT OF FRANCE.

268. **The Growth of the French Monarchy.**—The full political significance of the history of France can be appreciated only by those who keep in mind the chief phenomena of the widening monarchy, the successive steps by which the Dukes of France, the capable Capets, extended their power and the name of their duchy over the whole of the great territory which was to be inherited by Louis XIV. The course of French history is from complex to simple. In the days of Hugh Capet 'France' was the name of only a single duchy centring in Paris, one of a great number of feudal lordships equally great, equally vigorous, equally wedded to independence. The duchy's advantage lay in the fact that her dukes had been chosen for leadership and that they were capable of leadership, rather than in the possession of preponderant strength or superior resources. To the west of her lay the solid mass of Normandy; to the north lay the territories of the Counts of Flanders and Vermandois, and to the east the territory of the Count of Champagne; the great duchies of Burgundy and Acquitaine lay to the south, beyond them the lands of Toulouse; alongside of Normandy, Anjou and Brittany stretched their independent length to the west. And these were only the greater feudal sovereignties: within and about them lay other districts not a few with masters ready to assert privileges without number in contradiction of all central rule. The early history of France is the history of a duchy

striving to become a kingdom. 'France' holds a good strategic position, and fortune has made her dukes titular kings over their feudal neighbors, but still she is in reality only one among many duchies.

269. By slow and steady steps, however, a work of unification is wrought out by the Capets. In every direction they stretch out from their central duchy of France their hand of power and of intrigue and draw the pieces of feudalized Neustria together into a compact mass. The work is thoroughly done, moreover, at almost every stage: out of populations as heterogeneous as any in Europe they construct a nation than which none is more homogeneous: out of feudal lordships as strong, as numerous, as heady, and as stiffly separate as any other equal territory could show, they construct a single kingdom more centralized and compacted than any other in Europe. The processes of these singular achievements give to the history of the French monarchy its distinctive political significance: the means which the Capets devised for solidifying, and, after its solidification, for enlarging and effectuating their power, furnish some of the most suggestive illustrative material anywhere to be found for the general history of government.

270. **Perfection of the Feudal System in France.** — The feudal system worked its most perfect work in France. The opportunities of feudalism there were great. Neustria, the western, Gallic half of the great Frankish kingdom, was early separated from Austrasia, the eastern, Germanic half (secs. 252, 253), and its separateness proved the cause of its disintegration. Burgundy, Brittany, and Acquitaine sprang to the possession of unchecked independent power round about it; the Normans thrust their huge wedge of territory into it; battle after battle between those who contended for the possession of the pieces of the great empire which Charles the Great had swept together first decimated and finally quite annihilated the sturdy class of Frankish freemen whose liber-

ties had stood in the way of local feudal absolutism; privilege grew in the hands of feudal lords while prerogative declined in the hands of those who sought to be kings; those who possessed privilege built for themselves impregnable castles behind whose walls they could securely retain it: — and feudalism had its heyday in France.

271. It is reckoned that in Hugh Capet's day the "free and noble population" of the country out of which modern France was to be made numbered "about a million of souls, living on and taking their names from about seventy thousand separate fiefs or properties: of these fiefs about three thousand carried titles with them. Of these again, no less than a hundred, — some reckon as many as a hundred and fifty, — were sovereign states, greater or smaller, whose lords could coin money, levy taxes, make laws, administer their own justice."[1] Of these one hundred, however, only some eight or ten were really powerful states.

272. **Materials of the Monarchy.** — Such were the materials out of which the Capets had to build up their monarchy. It was their task to undo the work of feudalism. But these were not the only materials that they had to handle in the difficult undertaking. There were other privileges besides those of the feudal barons which it was necessary to destroy or subordinate before they could see their power compact and undisputed.

273. **Local Self-Government.** — Notwithstanding the fact that in most districts of the divided territory the power that ruled him was brought close to every man's door in the person of his feudal lord and master, there were many corners of the system which sheltered vigorous local self-government. The period of the greatest vitality of the feudal system was, indeed, the only period of effectual local self-government that France has ever known. The eventual supremacy of the crown, which snatched their power from the barons, also destroyed local self-government, which the barons had in many cases suffered to grow; and neither the Revolution nor any of

[1] G. W. Kitchin, *History of France*, Vol. I., p. 186.

the governments which have succeeded the Revolution has yet restored it to complete life. Local liberties were taking form and acquiring vigor during the very period in which the monarchical power was making its way towards supremacy; and it was by these local liberties that the kings found themselves faced when their initial struggle with feudalism was over. It was their final task to destroy them by perfecting centralized administrative organization.

274. **Rural Communes.** — While feudalism was in its creative period, while the forces were at work, that is, which were shaping the relations of classes and of authorities to each other, it was not uncommon for feudal lords to grant charters to the rural communes lying within their demesnes. In and after the twelfth century these charters became very numerous. They permitted a separate organic structure to the communes, regulated the admission of persons to communal privileges, laid down rules for the administration of property in the commune, set forth feudal rights and duties, prescribed the corvées, etc. "Everywhere a general assembly of the inhabitants directly regulated affairs," delegating executive functions to communal officers, who acted separately, each in the function with which he was specially charged. These officers convoked the general assembly of the people for every new decision that it became necessary to take with reference to communal affairs. The principal affairs within the jurisdiction of the assembly were, "the administration of communal property, which in that period was very important, police, and the collection of the taxes both royal and local."[1]

275. In the administration of justice, also, the Middle Ages witnessed in France not a few features of popular privilege. The peasant as well as the nobleman had the right to be tried by his peers, — by persons of his own origin and station. In the courts of the feudal barons the vassals were present to act

[1] H. de Ferron, *Institutions Municipales et Provinciales Comparées*, p. 3.

as judges, much as the freemen were present in the English county courts (secs. 655, 751).

276. **Liberties of Towns: the Roman Municipalities.** — The privileges of self-direction granted to the rural communes, however, were privileges granted, so to say, *inside vassalage:* the members of the communes were not freed from their constant feudal duties. Many towns, on the contrary, acquired and maintained a substantial independence. When the earliest Frankish kings failed in their efforts to establish a power in Gaul as strong and as whole as the Roman power had been, and the Frankish dominion fell apart into fragments whose only connection was a nominal subordination to a central throne, there were others besides the great landowners to avail themselves of the opportunity to set up independent sovereign powers of their own. The Franks, as we have seen, had found many Roman cities in Gaul, and, not at first taking kindly to town life, had simply conquered them and then let them be (sec. 232). In these, consequently, the old Roman organization had endured, freed from Roman dictation. The Franks who entered them later took character from them almost as much as they gave character to them. Germanic principles of moot-government and individual freedom entered, to a certain extent, like a new life-blood into the Roman forms, and compact, spirited, aggressive, disciplined communities were formed which were quick to lay hold of large privileges of self-rule, and even to assume semi-baronial control of the lands lying about them, in the days when independent powers were to be had for the seizing. The organization which Roman influences had bequeathed to these towns was oligarchical, aristocratic: the governing power rested with close corporations, with councils (*curiæ*) which were co-optative, filling their own vacancies. But forces presently appeared in them which worked effectually for democracy. The Christian Church, as well as the barbarian Teuton, took possession of Gaul: the greater towns became the seats of bishops; and the bishops

threw their weight on the side of the commons against both the counts outside the towns and the oligarchs inside. Only so could the magnates of the Church establish themselves in real power. In most cases the ecclesiastics and their restless allies, the commons, won in the contest for supremacy, and democracy was established.

The Italian towns, with their 'consuls' and their other imitations of the old Roman republican constitution, are perhaps the best examples of this renaissance of democracy.

277. **The Non-Roman Municipalities.** — These Roman towns were of course to be found for the most part only in the south and along the Rhine. North of the Loire, as the Franks took gradually to city life, there sprang up other towns, of Germanic origin and character; and these were not slow to agitate for grants of special privileges from their baronial masters. In very large numbers they obtained charters, — charters, however, which were to give them a connection with the feudal system about them which the towns of the south, antedating feudalism, did not for some time possess. They were given substantial privileges of self-government, but they were not severed from baronial control. They conducted their affairs, on the contrary, under charters in which the relative (customary) rights of both seigneur and *bourgeois* were definitely ascertained, by which seigneurial authority as well as burgher privilege was fully recognized, and under which, moreover, the authority of the seigneur was actually exercised through the instrumentality of a *Prévot*, the lord's servant and representative in city affairs.

This, the most secure form of municipal self-government, because the form which was most naturally integrated with the political system about it, — a form, also, which very naturally connected itself, mediately, with the supreme seigneurial authority of the king, — became in course of time the prevalent, indeed the almost universal, type in France. The

'prévotal' town is the normal town down to the end of the fifteenth century.

278. Not all of this development, of course, was accomplished peacefully or by the complaisance of the barons. Many cities were driven to defend their privileges against the baronage by force of arms; some, unable to stand out unaided against feudal aggressions, were preserved from discomfiture only by succor from the king, whose interest it served to use the power of the townsmen to check the insolent might of the feudal lords; others, again, were repeatedly constrained to buy in hard cash from neighbor barons a grudging tolerance for their modest immunities. The kings profited very shrewdly by the liberties of the towns, drawing the townspeople very closely about themselves in the struggles of royal prerogative against baronial privilege. As supreme lords in France, they assumed to make special grants of municipal citizenship: they made frequent gifts of *bourgeoisie* to disaffected vassals of the barons, — gifts so frequently made, indeed, that there grew up a special class of royal townsmen, a special *bourgeoisie du roi*.

279. **The Towns and the Crusades.** — Not the least important element in the growth of separate town privileges was the influence of the crusades upon the power of the nobility. When the full fervor of crusading was upon France, her feudal nobility were ready to give up anything at home if by giving it up they might be enabled to go to the holy wars, to the prosecution of which Mother Church was so warmly urging them. Their great need was money; money the towns had; and for money they bought privileges from departing crusaders. Very often, too, their one-time lords never returned from Palestine — never came back to resume the powers so hastily and eagerly bartered away before their departure. When they did return they returned impoverished, and in no condition of fortune to compete with those who had husbanded their resources at home. On every hand opportunities were made for the perpetuation of town privileges.

280. **Municipal Privileges.** — The privileges extorted or bought by the sturdy townspeople were, to speak in general

terms, the right to make all the laws which concerned only themselves, the right to administer their own justice, the right to raise their taxes (as well those demanded by king or baron as those which they imposed upon themselves for their own purposes) in their own way, and the right to discipline themselves with police of their own appointing. Such villages as contrived to obtain separate privileges could of course obtain none so extensive as these. They often had to seek justice before baronial rather than before their own tribunals, they could by no means always choose their own way of paying unjust charges, they had often to submit to rough discipline at the hands of prince's retainers, oftentimes the most they could secure for themselves was a right of self-direction in petty matters which interested only themselves.

The administrative functions exercised by the towns have been thus summed up: the administration of communal property, the maintenance of streets and roads, the construction of public edifices, the support and direction of schools, and the assessment and collection of all taxes.[1]

The Parliament of Paris (secs. 293–296) refused to recognize exemptions from municipal charges claimed in certain cases by the noblesse.

281. **Forms of Town Government.** — The forms of self-government in the towns varied infinitely in detail, according to place and circumstance, but the general outline was almost everywhere the same. Often there were two assemblies which took part in the direction of municipal affairs, an Assembly of Notables and a General Assembly of citizens. These two bodies did not stand to each other in the relation of two houses of a single legislature; they were separate not only, but had also distinct functions. The popular body elected the magistrates; the select body advised the magistrates; the one was a legislative, the other an executive, council. More commonly, however, there was but one assembly, the general

[1] Ferron, p. 8.

assembly of citizens, which elected the magistrates, exercised a critical supervision over them, and passed upon all important municipal affairs. The magistracy generally consisted of a mayor and aldermen who acted jointly as the executive of the city (its *corps de ville*), the mayor in most cases being only the president, never the 'chief executive,' of the corporation, and mayor and aldermen alike being equal in rank and in responsibility in exercising their corporate functions.

282. **Decay or Destruction of Municipal Self-Government.** — From this democratic model there were, of course, in almost all cases, frequent departures, quite after the manner formulated by Aristotle (sec. 1164). Oligarchy and tyranny both crept in, time and again; nowhere did local liberties permanently preserve their first vigor; everywhere real self-government sooner or later succumbed to adverse circumstance, crushed in very many cases by the overwhelming weight of the royal power. Generally such changes were wrought rather by stress of disaster from without than because of degeneracy within: and in very few cases indeed did local liberty die before the community which had sought to maintain it had given proof of a capital capacity for self-government. The independence of the cities died hard and has left glorious memories behind it.

283. **Pays d'États.** — Earlier times had seen self-government in the provinces also. Every province, probably, had had its own 'Estates,' its own triple assembly, that is, of nobles, clergy, and burghers, which met to discuss and in large part, no doubt, to direct provincial affairs. The provinces with estates (*pays d'états*) represent one sort of self-government, the towns and communes quite another sort. The provinces of old France, thirty-six in number, represented separate feudal entities, much as the English counties did (sec. 655). The towns, on the other hand, in the central and northern portions of France at least, represented nothing but grants of privilege, were communities which had been given a

special and exceptional place in the feudal order. The assemblies of the provinces, accordingly, were not primary or democratic like those of the towns, but were made up *by 'estates,'*—models for the States-General which appeared in 1302 (secs. 288–289).

> The provincial Estates were probably in their origin nothing else than normal feudal councils, made up, as they were, of representatives of all who possessed corporate or individual privileges, whose judgments and advice feudal dukes and counts found it redound to their greater peace and welfare to hear and heed.

In several of the provinces, as, notably, in Languedoc and Brittany, these provincial Estates continued to meet and to exercise considerable functions down to the time of the Revolution. Such provinces came to be distinguished from the others as *pays d'états* (provinces having Estates), and it is largely from the privileges of their assemblies that we argue the general nature of the powers possessed by those which had passed out of existence before history could catch a glimpse of them. We see the Estates of the *pays d'états* clearly only after the royal power has bound together all the provinces alike in a stringent system of centralization; they sit only at the king's call; their resolutions must be taken in the presence of the king's provincial officers and must await the regal sanction; they live by the royal favor and must in all things yield to the royal will. Nevertheless their privileges are still so substantial as to make the *pays d'états* the envy of all the rest of France. They bought of the crown the advantage of themselves collecting the taxes demanded by the central government; they retained to the last the right to tax themselves for the expenses of local administration and to undertake and carry through entirely without supervision the extensive improvements in roads and watercourses to which the local patriotism bred by local self-government inclined them. Restricted as their sphere was, they moved freely within it, and gave to their provinces a vitality and a pros-

perity such as the rest of France, administered, as it was, exclusively from Paris, speedily and utterly lost.

284. **Functions of the Provincial Estates in Finance.** — The Estates apportioned the taxes among the various sub-divisions, or districts, of the province. In these districts there were assemblies, nominated by and subordinate to the provincial Estates, which apportioned the taxes in their turn among the parishes. The parochial officers, last of all, apportioned the taxes among individual taxpayers.

The king in the earlier days was represented in the Estates by a commissioner; but the authority of the chief royal agent in the province was one of supervision merely, not one of command.

285. **Territorial Development of the Monarchy.** — The process of the organic development of the monarchy began, of course, with territorial expansion and consolidation. For eight centuries that expansion and consolidation went steadily on; but its successful completion was assured before the extinction of the first, the direct, line of Capets in 1328. Before that date Philip Augustus had wrung Normandy from England and had added Vermandois, Auvergne, Touraine, Anjou, Maine, and Poitou to the dominions of his crown, and his successors had so well carried forward the work of expansion that before the Valois branch came into the succession only Flanders, Burgundy, and Brittany broke the solidity of the French power in the north, and only Aquitaine, still England's fief, cut France off from her wide territories in the southeast. It had been the mission of the direct line of the Capets to lay broadly and irremovably the foundations of French unity and nationality, and they had accomplished that mission. They gave to their monarchy the momentum which was afterwards to carry it into full supremacy over Brittany, Aquitaine, and Burgundy, over the Rhone valley, and over the lands which separated her from the Rhine.

286. **The Crusades and the Monarchy.** — The monarchy, even more than the towns (sec. 279), profited by the effects of the crusades on the feudal nobility. So great was the loss of life among the nobles,

so great was their loss of fortune, that they fell an easy prey to the encroaching monarchy. During the first crusades the French kings stayed at home and reaped the advantages which the nobles lost; during the last crusades, the kings were strong enough themselves to leave home and indulge in holy warfare in the East, without too great apprehension as to what might happen to the royal power in their absence.

287. **Institutional Growth.** — Of course along with territorial expansion there went institutional growth: and this growth involved in large part the destruction of local liberties. The amalgamation of France into a single, veritable kingdom was vastly more fatal to local self-government than the anarchy and confusion of feudal times had been. The cities could cope with neighbor lords; and during the period of contest between king and barons they could count oftentimes upon assistance from the king: his interests, like theirs, lay in the direction of checking baronial power. But when the feudal lords were no longer to be feared, the towns in their turn felt the jealousy of the king; and against his overwhelming power, when once it was established, they dared not raise their hands. The ancient provinces, too, had in the earlier days found ways of bringing local lords into their Estates, in which the right of the burghers to have a voice in the government was recognized (sec. 283). But they could no more resist the centralization determined upon by a king triumphant over all feudal rivals than the towns could. In the end, as we have seen, the provincial assemblies, where they managed to exist at all in the face of the growing power of the Crown, were, like all other independent authorities of the later time, sadly curtailed in privilege, and at the last almost entirely lost heart and life.

288. **The States-General.** — At one time, indeed, it seemed as if the nation, in being drawn close about the throne, was to be given a life of its own in a national parliament. Philip the Fair (1285–1314), bent upon making good his authority against the interference of the Pope in certain matters, bethought himself of calling representatives of the nation to his sup-

port. The kings of France had already, of course, often taken the advice upon public affairs of the baronage or of the clergy, each of which orders had a corporate existence and organization of its own, and therefore possessed means of influential advising: but Philip called in the burghers of the towns also and constituted (1302) that States-General (*États-Généraux*) in which for the first time in French history that 'third estate' of the Commons appears which in later times was to thrust both clergy and nobles out of power and itself rule supreme as 'the people.'

289. **Character of the States-General.** — The first States-General, summoned by Philip the Fair, reminds one not a little of the parliament called together in England in 1295 by Edward I. (secs. 667, 669): apparently France was about to have a parliament such as England's became, a representative body, speaking, and at the end of every important contest bringing to pass, the will of the nation. But for France this first promise was not fulfilled. During three centuries, the fourteenth, fifteenth, and sixteenth (1302–1614), it was the pleasure of the French monarch to keep alive, at first by frequent, and later by occasional summons, this assemblage of the three Estates. This was the period during which feudal privileges were giving way before the royal prerogative, and it was often convenient to have the formal sanction of the Estates at the back of acts of sovereignty on the part of the Crown. But after the full establishment of the regal power the countenance of the Estates was no longer needed, and was no longer asked. The States-General never, moreover, even in the period of their greatest activity, became a legislative authority. For one thing, they had not the organization proper, not to say necessary, for the exercise of power. The three Estates, the Nobility, the Clergy, and the Commons (*Tiers État*), deliberated apart from each other as separate bodies; and each submitted its own list of grievances and suggestions to the king. They acted often in harmony, but never in union; their only com-

mon meeting was the first of each session, when they all three assembled in the same hall to hear a formal opening speech from the throne. They never acquired the right to be consulted with reference to that cardinal affair of politics, taxation; they never gained the right to sit independently of royal summons. They were encouraged to submit what suggestions they chose to the government concerning the administration of the kingdom; and, as a matter of fact, their counsels were often heeded by the king. But they never got beyond advising: never won the right to expect that their advice would be taken.

Their sessions did, however, so long as they continued, contribute to keep alive a serviceable form of self-government which at least held the nation within sight of substantial liberties; and which, above all, secured national recognition for that 'third estate,' the people, whose sturdiest members, the burghers of the towns, were real representatives of local political life.

290. **Administrative Development.** — Of course along with the territorial expansion of the monarchy by annexation, absorption, and conquest there went also great administrative developments. As the monarchy grew, the instrumentalities of government grew along with it: possession and control advanced hand in hand.

291. **Growth of the Central Administration.** — In the earlier periods of the Capetian rule a Feudal Court and certain household officers constituted a sufficient machinery for the central administration. There was a *Chancellor*, who was the king's private secretary and keeper of both the public and the private records of the court; a *Chamberlain*, who was superintendent of the household; a *Seneschal*, who presided in the king's name and stead in the Feudal Court, and who represented the king in the direct administration of justice; a *Great Butler*, who was manager of the royal property and revenues; and a *Constable*, who was commander of the forces. The Feudal Court, composed of the chief feudatories of the Crown, exercised the functions of a tribunal of justice in suits between

tenants *in capite*, besides the functions of a taxing body and of an administrative council (secs. 177, 184, 185).

292. **The Council of State.** — So long as 'France' was only a duchy and the real territory of the Crown no wider than the immediate domain of the Capetian dukes, the weight of administration fell upon the officers of the household, and the Feudal Court was of no continuous importance. But as France grew, the household officers declined and the Feudal Court advanced in power and importance. As the functions of the Court increased and the Court became a directing Council, the Council, of course, more and more tended to fall apart into committees, into distinct sections, having each its own particular part of the duties once common to the whole body to perform. The earlier Councils exercised without distinction functions political, judicial, and financial, and their differentiation, though hurried forward by monarchs like Louis IX., was not given definite completeness until 1302 (the year of the first States-General) when, by an ordinance of Philip the Fair, their political functions were assigned to the body which was to retain the name Council of State, their judicial functions to a body which was to bear the ancient name of parliament (and which we know as the Parliament of Paris), their financial functions to a Chamber of Accounts. Alongside of the Chamber of Accounts there sprang up a Chamber of Subsidies which concerned itself with taxation. Into these bodies, whose activity increased from year to year, the old officials of the household were speedily absorbed, the Great Butler, for instance, becoming merely the president of the Chamber of Accounts.

293. **The Parliament of Paris.** — The judicial section of the Council of State consisted at first, of course, like the other sections, like the whole Council indeed, of great feudatories of the Crown, as well as of administrative experts gradually introduced. More and more, however, this chief tribunal tended to become exclusively a body of technical officials, of trained jurists and experienced lawyers, the law officers and advisers of the Crown.

294. **Departments of Administration.** — The Chamber of Accounts and the Parliament of Paris presently became hard crystals, separate and persistent entities in the public organization; but differentiation within the Council of State continued. The Council fell into departments. By an ordinance of 1644 (issued under the direction of Mazarin during the infancy of Louis XIV.) six departments of administration were created: (1) A Cabinet for the consideration of political questions, (2) a diplomatic and military section, (3) a judicial section meant to serve as a court of conflicts, determining disputes between other departments, (4) an extraordinary cassation, or supreme judicial, department, to stand at the head of the ordinary courts of justice, (5) an exchequer section, and (6) a department of correspondence, or, in modern phrase, of the interior.

295. **The Ministerial System.** — The departmental organization of the Council of State represented, however, only a new ministerial system including (1) a Chancellor, who acted as president of the judicial committees of the Council (except the cassation department, in which he sat as an ordinary member),[1] and who was chief of the system by means of which, through a *Procureur-Général* and his substitutes throughout the kingdom, public prosecution was conducted and the central administration represented in the local and provincial courts; (2) a Comptroller-General of the Finances, who was in effect Minister of the Interior; (3) a Minister of the Royal Household, who was dispenser of those most potent things, patronage and penalties, and who was virtually minister of religion; (4) a Minister of War; (5) a Secretary of State for Foreign Affairs; and (6) a Secretary of State for Marine and the Colonies (sec. 323).

296. **Growth of Centralized Local Administration: Louis IX.** — The expansion of the central organs of administration

[1] See sec. 737 for the now very similar position of the English Chancellor. See the same section on the English Chancellor's position as in some sort minister of justice.

meant, of course, that the royal government was entering more and more extensively into the management of affairs in the provinces, that local administration was being centralized. This extension of centralized local administration may be said to have begun in earnest under Louis IX. Louis IX. did more than any of his predecessors to strengthen the grip of the monarchy upon its dominions by means of direct instrumentalities of government. He was a man able to see justice and to do it, to fear God and yet not the Church, to conquer men not less by uprightness of character than by force of will and of arms; and his character established the monarchy in its power. By combined strength and even-handedness he bore down all baronial opposition; the barons subjected to his will, he sent royal commissioners throughout the realm to discover where things were going amiss and where men needed that the king should interfere; he established the right of appeal to his own courts, even from the courts of the barons, thus making the Parliament of Paris (sec. 293) the centre of the judicial system of the country; he forced limitations of power upon the feudal courts; he forbade and in part prevented judicial combats and private warfare. He drew the administration of the law in France together into a centralized system by means of royal *Baillis* and *Prévôts*, whom he subordinated to the Parliament of Paris.

297. **Steps of Centralization.** — It is not, of course, to be understood that Louis' work was to any considerable extent a work of creation: it was not, but rather a work of adaptation, expansion, systematization. The system which he perfected had been slowly growing under his predecessors. The *bailli* was, in the Middle Ages, a very common officer, representing king or seigneur, as the case might be, administering justice in his name, commanding his men-at-arms, managing the finances, caring, indeed, for every detail of administration. At first, it is said, "all of judicial, financial, and military administration was in his hands." It was an old system of royal *baillis*, set over districts known as *bailliages* (bailiwicks), that Louis IX. extended and regulated, keeping an eye to it, however, the while, that the *baillis* should be made to feel their dependence upon the Crown so constantly that they should

per force remain officials and not dream of following the example of dukes and counts, and becoming independent feudal lords on their own account.

Subsequent developments effected a natural differentiation and specialization in the office of *bailli*. There came to be, on the one hand, *bailiffs of the robe* (*baillis du robe*) charged with the administration of justice, and, on the other hand, *bailiffs of the sword* (*baillis d'épée*) charged with the administration of military affairs, as well as more and more numerous lieutenants to the various *baillis*. The resident *baillis* and *prévôts* (a virtually equivalent title), acting under general commission to see that the king's authority was recognized and obeyed, the king's taxes collected, etc., gradually absorbed almost all administrative power. There appeared also, in the course of these developments, Treasurers-General and Receivers of Domains, and Captains-General in each of the *bailliages*.

The old office of Seneschal (sec. 291) became merged in that of Chief *Bailli* and *Prévôt* of Paris.

298. **Personal Government: Louis XIV.** — Such measures of course tended to subordinate all local magnates to the king. By the policy of Louis XIV. this tendency was completed: the whole of the nobility of France were, so to say, merged in the person and court of the king. Louis took care to have it understood that no man who remained upon his estate, who did not dance constant attendance upon his majesty, the king, at his court, to add to its brilliancy and servility, might expect anything but disfavor and loss. He made of the great landed nobility a court nobility, turning men from interest in their tenants and their estates to interest in court intrigue alone. He drew all men of rank and ambition to himself, merged them in himself, and left nothing between the monarchy and the masses whereby the terrible impact of the great revolution which was to come might be broken.

299. **The Completed Centralization: the Intendant.** — Finally came the completed centralization which followed the days of Richelieu, whose central figure was the *Intendant*, a direct appointee and agent of the king and absolute ruler in every province; and whose lesser figures were the sub-delegates of the Intendant, rulers in every district and commune. The rule of these agents of the crown almost totally extinguished the separate privileges of the elected magistrates of the towns

and of the other units of local government. In many places, it is true, the people were suffered still to elect their magistrates as before; but the usurping activities of the Intendant and his subordinates speedily left elected magistrates with nothing to do. In other cases election ceased; the crown sold the local offices as life estates to any one who would buy for cash.

300. **The Province** was a military, not a civil, administrative district. The Provinces were grouped into *Generalities*, of which there were in all thirty-two, and it was over a *Generality* that each Intendant ruled. Ecclesiastical administration was served by still another distinct division into *Dioceses*.

301. **The Office of Intendant** is said to have originated in that of Master of Accounts. Masters of Accounts rode circuit through the provinces, on semi-judicial errands connected with the revenue; and in later times their functions fell to an officer called the Intendant. The Intendants were thus properly subordinates of the Comptroller-General of the Finances; but the Comptroller-General became in effect minister of the interior, charged with the oversight of almost all affairs of internal administration, and the Intendants became general rulers over the Generalities.

There had first emerged, in Richelieu's time, Intendants of Justice and Police (sometimes also of Finance), who had "acted in all those affairs, civil and criminal, which the king wished to take away from the ordinary judges." The functions of the full-fledged Intendant of later times are thus summed up by Guizot: they were "magistrates whom the king sent into different parts of the kingdom to look to all that concerned the administration of justice, of police, and of the finances; to maintain good order and to execute such commissions as the king or his council laid upon them."

From the moment when the system of Intendants was fixed upon the country, says Ferron (p. 14), "the provincial Estates assembled only upon the order of the king; the duration of their sessions was fixed at forty days. All their important deliberations, the whole of their receipts and expenditures, were subject to approval by decree of the council of the king."

302. **Judicial Centralization.** — The local tribunals of justice in like manner had their business gradually stolen from them. The principle of appeal established by Louis IX. at

length worked its perfect work. Every case in which any interest cared for from Paris (and what interest was not?) was either actually or by pretence involved was 'evoked' to special courts set up by royal commission. No detail was too insignificant to come within the usurpations of the king's government.

303. **The Royal Council and the Comptroller-General.** — The Royal Council at Paris regulated, by 'orders in council,' every interest, great or small, in the whole kingdom. The Comptroller-General, acting through the Intendants and their sub-delegates, and through the royal tribunals, managed France. Everybody's affairs were submitted to him, and through him to the Royal Council; and everybody received suggestions from Paris touching his affairs. No labor of supervision was too overwhelming for the central government to undertake. Interference in local affairs, made progressively more and more systematic, more and more minute and inquisitive, resulted, of course, in the complete strangulation of local government. All vitality ran to the veins of the central organism, and, except for the lingering and treasured privileges of the *pays d'états*, and for here and there a persistent form of town life, France lay in the pigeon-holes of a bureau. *Tabla rasa* had been made of the historical elements of local government.

304. **The Spirit of the Administration.** — This busy supervision of local and individual interests was always paternal in intent; and the intentions of the central power were never more benevolent than just when the Revolution was beginning to draw on apace. "The royal government was generally willing in the latter half of the eighteenth century to redress a given case of abuse, but it never felt itself strong enough, or had leisure enough, to deal with the general source from which the particular grievance sprang."[1]

305. **The Revolution.** — This whole fabric of government went to pieces in the storm of the Revolution. But the revo-

[1] Mr. John Morley's *Miscellanies*, Vol. II. (last Macmillan edition), essay on "Turgot," p. 138.

lutionists, when their stupendous work of destruction had been accomplished, were under the same necessity to govern that had rested upon the monarch whom they had dethroned and executed; and they very soon proved themselves unable to improve much on the old patterns of government. In denial of the indefeasible sovereignty of the king, they proclaimed, with huzzahs, the absolute sovereignty of the people; but Assembly and Convention could do no more than arrogate all power to themselves, as the people's representatives, and seek to reign in the king's stead through the king's old instrumentalities. They gave voice to a new conception, but they could not devise a new frame of administration. The result was confusion, Committees, the Terror, — and Napoleon.

306. **Administrative Work of the Revolution.** — The Revolution removed all the foundations of French *politics*, but scarcely any of the foundations of French *administration*. The Constituent Assembly enacted in 1791 that there should be six ministries, namely, of Justice, the Interior, Finance, War, Marine, and Foreign Affairs. In 1794 the ministries were abolished and twelve executive *commissions* substituted which were to act under the direction of the now execrated Committee of Public Safety. With the Directory, however, (1795), the ministries came again into existence.

307. **The Reconstruction by Napoleon.** — The interests of the royal administration had of course centred in the general government, rather than in its local parts, — in patronage, in the aggregate national power and prosperity, in finance. The true interests of republican government, on the other hand, centre in thorough local development: republican work, properly done, ought to tend to broaden and diversify administrative work by diversifying political life and quickening self-directive administrative agencies. But this the leaders of the Revolution neither saw nor could do; and Napoleon, whom they created, of course made no effort to serve republican development.

308. Napoleon simply reorganized despotism. In doing so, however, he did scarcely more than carry into effect the principal purposes of the Constituent Assembly. The legislation of that Assembly had sought, not to shatter centralization, but to simplify and systematize it; and it was this purpose that Napoleon carried out. For the Convention and Assembly, as representatives of the nation's sovereignty, he substituted himself; and then he proceeded to give to centralization a perfected machinery. The Convention and Assembly had endeavored to direct affairs through Committees, Commissions, Councils, Directories, — through executive *boards*, in a word. For such instrumentalities Napoleon substituted single officers as depositaries of the several distinct functions of administration; though he was content to associate with these officers advisory councils, whose advice they might ask, but might take only on their own individual responsibility. "'To give advice is the province of several, to administer, that of individuals,' says the maxim which he engraved on the pediment of the administrative arrangements of France,"[1] to remain there to the present day. The Constituent Assembly, willing to obliterate the old Provinces of France, with their memories of feudal privilege, and the *Generalities*, with their ancient savor of absolutism, had redivided the country, as symmetrically as possible, into eighty-nine *Departments;* and it was upon this territorial framework that Napoleon superimposed a machinery of Prefects and sub-prefects, modelled, with simplifications and improvements of method, upon the system of Intendants and delegates of the old *régime*. This he accomplished in that celebrated "Constitution of the Year VIII" which still lies almost undisturbed at the foundation of French administration. The Revolution had resulted in imparting to centralization what it never had before; namely, assured order and effective system.

[1] Marquardsen's *Handbuch*, Lebon's monograph on *France*, p. 78.

Since the war between France and Germany in 1870–'1, the Departments of France have numbered only eighty-six, the loss of Alsace and Lorraine having subtracted three Departments.

309. **Advances towards Liberal Institutions.** — Nevertheless, the Revolution had asserted a new *principle* of rule, and every change of government which has taken place in France since the Revolution has pushed her, however violently, towards genuine representative institutions and real republicanism. Louis XVIII., though he persisted in holding to the divine right of kings and in retaining for himself and his ministers an exclusive right of initiative in legislation, assented to the establishment of a parliament of two houses and conceded to it ministerial responsibility. Louis Philippe abandoned the delusion of the 'divine right,' acknowledged the sovereignty of the people, and shared with the chambers the right of initiative in legislation. With Napoleon III. came reaction and a return to a system like that of the first Napoleon; but even Napoleon III. had consented to return to the practice of ministerial responsibility before the war with Germany swept him from his throne and gave birth to the present Republic.

310. **The Third Republic.** — The Third Republic was proclaimed in Paris by Gambetta on the 4th September, 1870. Its government was at first provisional, the war with Germany being still in progress. On the 8th February, 1871, a national assembly was chosen, by universal suffrage, to fix upon terms of peace with Germany: and it was as agent of this assembly that M. Thiers concluded the treaty which saved Belfort and was soon to rid French territory of German troops.

311. **The Framing of the Constitution.** — But the assembly deliberately outlived its commission as peace-concluder, and continued to direct the affairs of the country till February, 1876, ending by assuming the functions of a constituent assembly and framing a permanent constitution. The present constitution was, therefore, adopted by this assembly on the

25th February, 1875. It went into operation one year later, in February, 1876. It gave to the government of the country substantially the organization which had been improvised by the assembly which framed it while the negotiations with Germany were in progress and while the terrible uprising of the Commune in Paris was being suppressed. As the assembly had governed while bringing order out of the chaos of the war-time, so, that same assembly concluded, should the country continue to be governed after the adjournment of its self-constituted rulers. The assembly had governed, at first through a President of the Republic elected by itself, who met the assembly at its sessions as a responsible minister, and held office by their continued favor. Later it directed affairs through a cabinet of responsible ministers appointed by a President elected as before, by the assembly, but with no right to take part in the deliberations of the assembly, except through the ministers, and given a definite term of seven years. This latter practice they embodied in the new constitution which they at last reluctantly adopted.

The persistence of the assembly in holding on to a governing power not contemplated in the commission it had received from the country as peace-maker only, and its reluctance in giving to the country a regular government which should supersede this unwarranted provisional system of its own, are easily explained by the composition of the assembly. Singularly enough, considering the posture of affairs at the time of the elections (1871), a majority of the members of the assembly was composed of partisans of a monarchical form of government. Had there not been disunion among them, the monarchists could easily have outvoted the republican members. But the monarchical majority was made up of three irreconcilable factions: *Legitimists*, who favored the restoration of the elder Bourbon line, *Orléanists*, who wanted the younger line (the Orléans branch) brought back to the throne, and *Bonapartists*, who wished to see the Empire re-established. These factions were able to agree upon nothing but this, that it would be dangerous to leave the making of a constitution to another assembly which might have a republican majority. They clung to power, therefore, in hopes of being able to agree upon some sort of a monarchy. But the agreement never

came, and they had at last to frame a constitution as conservative as they dared make in face of a country unmistakably determined upon republicanism. But they invested Marshal MacMahon with the presidential power for a term of seven years, and provided that there should be no president elected under the new constitution until his term had expired. MacMahon was at once a patriotic soldier and a partisan of monarchy. It was hoped that he might be able to keep the chief executive place of the nation warm for some sovereign to be afterwards agreed upon, and enthroned by *coup d'état*. These calculations, however, miscarried. Before his term was out (January, 1879) MacMahon was forced by the Chambers to resign, a President was elected under the new order of things, and all the plans of the monarchical parties were again at sixes and sevens.

312. **Character of the Constitution.** — The provisions of the Constitution are comparatively few and simple. It lays down certain main lines of organization, and leaves the rest to be done by ordinary statute. In practice, even the precedents of previous constitutions have been suffered to have a part in supplementing it. So much of former constitutional law as is not incompatible with the laws of the new republic is considered to be still in force. There has thus been no absolute break with the past, but only a new construction on its foundations.

313. **The Sovereignty of the Chambers.** — It is noteworthy that the Constitution itself differs from an ordinary statute only in having its amendment surrounded by certain differences of legislative procedure. It was framed and promulgated by a legislature, — the provisional national assembly already spoken of (sec. 310), — and went into force without being submitted to a vote of the people; and it can be changed or altogether abrogated by the Legislature which it called into existence, if only the two Houses of that Legislature act in the matter jointly, as a National Assembly, and not separately as ordinary legislative chambers. The Legislature is, besides, the only body competent to pass upon the constitutionality or unconstitutionality of legislation, — the only authoritative in-

terpreter of the Constitution. France, like England, vests in her parliament a complete sovereignty of discretion as to its own acts.

The principal difference between the two cases is, that the English Parliament may exercise all its powers in the same way, by ordinary procedure, while the French Chambers are put under certain limitations of procedure in the exercise of their sovereignty as it affects fundamental law (sec. 318).

314. **The Senate.** — This sovereign parliament consists of two Houses, a Senate and a Chamber of Deputies. The Constitution says nothing as to the composition of either of these bodies; in the case of the Senate, it is silent even as to the manner of its election; so far as its provisions are concerned, the Senate might be constituted by executive appointment, or by lot. By statute, however, the Senate has been made to consist of three hundred members chosen by 'electoral colleges' specially constituted for the purpose in the several Departments, and the term of senatorship has been fixed at nine years. Forty years has been declared the minimum age for senators. The electoral college for the choice of senators is composed in each Department of the deputies from the Department, the members of the 'General Council' of the Department (sec. 341), and the members of the Councils of its several Arrondissements (sec. 347), together with certain delegates chosen by the Communes from the membership of the communal or municipal Councils (sec. 351). One-third of the membership of the Senate is renewed every three years.

Just as one-third of the Senate of the United States is renewed every two years. Most European constitutions have adopted some such method of partial renewal of certain representative bodies at intervals shorter than the term of membership.

Until 1884 seventy-five of the senators were chosen, by the Senate itself, for life. By virtue of a constitutional change effected in 1884, all vacancies occurring in these life-memberships are now filled by election in the Departments, as other seats are, and for the usual term of

nine years. This process will in time, of course, do away with all life-membership.

Legislation determines from time to time how many senators shall be elected by each Department. According to the present distribution thirty, or one-tenth of the whole number, are returned by the city of Paris, which itself constitutes a Department.

315. **The Chamber of Deputies.** — Of the choice of members of the Chamber of Deputies, the Constitution says no more than that they shall be elected by universal suffrage. Statute law has organized the Chamber on the basis of one deputy to every seventy thousand inhabitants. Deputies must be at least twenty-five years of age, and their term, unless the Chamber be sooner dissolved, is four years. The Department is the basis of representation in the Chamber as in the Senate. To each Department is assigned a certain number of deputies, according to its population; every Department, however, whatever its population, being entitled to at least three representatives in the Chamber. The deputies are elected not 'at large' for the whole Department, that is, on a general ticket, but by districts, as members of our federal House of Representatives are chosen in the States (sec. 1066). The *Arrondissements* serve as 'congressional districts,' as we should call them, — and this method of voting is accordingly known in France as *scrutin d'arrondissement.*

In 1885 the system of voting for deputies in each Department on a general ticket, as we vote for presidential electors in the States, was introduced, being called *scrutin de liste*. It was adopted at the suggestion of Gambetta, who thought that a system of general tickets would give his party a freer sweep of popular majorities. But in 1889 *scrutin d'arrondissement*, which had been in use before 1885, was re-established, because *scrutin de liste* had given too free a sweep to the popular majorities of General Boulanger.

The principal colonies, too, are entitled to representation in the Chamber. Algiers sends five deputies; Cochin-China, Guadeloupe, Guyana, India, Martinique, Réunion, and Senegal each send one. All counted, there are five hundred and eighty-four

deputies. Elections to the Chamber do not take place at regular intervals and on fixed dates named by statute, but must be ordered by decree from the President of the Republic in each case. The law directs, however, that the President must order an election within sixty days, or in case of a dissolution, within two months after the expiration of a term of the Chamber; and that the new Chamber must come together within the ten days following the election. At least twenty days must separate decree and day of election.

316. **In Case of Usurpation.** — In case the Chambers should be illegally dissolved or hindered from assembling, the General Councils of the Departments are to convene without delay in their respective places of meeting and take the necessary steps for preserving order and quiet. Each Council is to choose two delegates to join delegates from the other Councils in assembling at the place whither the members of the legal government and the regular representatives of the people who have escaped the tyranny have betaken themselves. The extraordinary assembly thus brought together is authorized to constitute itself for business when half the Departments shall be represented; and it may take any steps that may be necessary to maintain order, administer affairs, and establish the independence of the regular Chambers. It is dissolved, *ipso facto*, so soon as the regular Chambers can come together somewhere within the state. If that be not possible, it is to order a general election, within one month after its own assembling.

317. **The National Assembly: its Functions.** — The Senate and Chamber of Deputies meet together in joint session as a National Assembly for two purposes: the revision of the Constitution and the election of the President of the Republic. The Houses meet for the performance of their ordinary legislative functions in Paris; as a National Assembly they meet in Versailles, apart from the exciting influences of the great capital, which has led so many assemblies captive. Whether met for the election of the President or for the revision of the Constitution, the National Assembly must do the single thing which it has convened to do and then at once adjourn. For the election of the President there are clearly determined times

whenever the office of President falls vacant, whether by the death or resignation of the President or by the expiration of his term.

318. **Revision of the Constitution.** — A revision of the Constitution may take place whenever the two Houses are agreed that revision is necessary. It has, thus far, been customary for the Houses to consider separately beforehand not only the propriety of *a* revision, but also the particular points at which revision is necessary and the lines on which it should proceed; and to know each other's minds on these important heads before agreeing to a National Assembly. Alike for the election of a President and for the adoption of constitutional amendments an absolute majority vote suffices.

It might easily happen, therefore, that the majority in one of the Houses would be outvoted on joint ballot in National Assembly. If such were likely to be the case, that majority could hardly be expected to consent readily to a joint session. France has, not two, but many national parties, and it is not always possible to effect the same combination of factions in support of a ministry in both the Houses. Cases must frequently arise in which a joint vote of the two Houses upon a particular measure would carry with it defeat to the policy preferred in one of them.

The National Assembly is the most completely sovereign body known to the Constitution, there being but one thing it cannot do under existing law: it cannot sit as long as it pleases. Its sessions must not exceed in length the duration of an ordinary legislative session (five months).

The officers of the Senate act as officers of the National Assembly. They consist of a President, four Vice-Presidents, six Secretaries, and four Quæstors, elected for one year. The Chamber of Deputies has the same offices, with the addition of two more secretaryships.

319. **The President of the Republic.** — The president, elected by the joint ballot of the Chambers, is titular head of the Executive of France. His term of office is seven years. He has the power of appointing and removing all officers of the public

service. He has no veto on legislation, but he is authorized to demand a reconsideration of any measure by the Houses; he can adjourn the Chambers at any time (though not more than twice during the same session) for any period not exceeding one month; he can close a regular session of the Houses at his discretion after it has continued five months, and an extra session when he pleases; and he can, with the consent of the Senate, dissolve the Chamber of Deputies, even before the expiration of five months. A dissolution of the Chamber of Deputies puts an end also of course to the sessions, though not to the life, of the Senate, inasmuch as it cannot act without the Chamber. In the event of a dissolution, as has been said, the President must order a new election to be held within two months thereafter, and the Houses must convene within ten days after the election.

The only limitation put by the constitution upon the choice of the National Assembly in electing a President of the Republic is, that no one shall be chosen President who is a member of any family which has occupied the throne of France.

320. The President's power of dissolving the Chamber might, on occasion, be used to bar even the proceedings of the National Assembly. The consent of the Senate having been obtained, the President could dissolve the Chamber while the National Assembly was in session, and so deprive that body of two-thirds of its members, leaving it without that 'absolute majority,' lacking which it can take no authoritative action. Such a course would, however, be clearly revolutionary, — more revolutionary than any action of the Assembly that it might be used to prevent, — and would, though perhaps technically defensible, have no real sanction of law.

321. **Influence of President and Senate.** — The President and Senate, it will be seen, are given a really very great power of control over the Chamber of Deputies. It is within the choice of the President to moderate the excesses of the Chamber by returning bills to it for reconsideration, or by adjourning it during a period of too great excitement; and it is within the choice of the President and Senate acting together to appeal from its decisions to the constituencies by a dissolution. The Senate, moreover, has been given so many members of

real weight of character and distinction of career that it would seem to have been in a position to act in restraint of the Chamber with firmness and success. But the later presidents (Grévy and Carnot) have been men of so little force and the Senate has played so timid a part in affairs that this position of advantage has been altogether sacrificed; and the unbridled license of the Chamber now (April, 1889) constitutes one of the chief menaces to the success and even a menace to the existence of the Republic.

322. **The Cabinet and the Council of Ministers.** — *A Cabinet of ministers* constitutes a link between the President and the Chambers: and the political functions of this Cabinet are amongst the central features of government in France. It is to be carefully distinguished from the *Council* of ministers; both the Cabinet and the Council consist of the same persons; but the Cabinet is a political body exclusively, while the Council has only administrative functions. The distinction illustrates pointedly the double capacity of the ministers.

323. **The Ministries.** — There are now eleven ministers: the Minister of *Justice*, filling the office filled before the Revolution by the Chancellor (sec. 295); the Minister of *Finance*, who has taken the place of the Comptroller-General of ante-revolutionary days (secs. 295, 300, 303); the Minister of *War*, who acts as head of the administrative department created in the time of Mazarin (1644); the Minister of *Marine and the Colonies* (1644); the Minister of *Foreign Affairs* (1644, see sec. 294); the Minister of the *Interior*, an office created by the Constituent Assembly in 1791 (sec. 306), by a consolidation of the pre-revolutionary offices of Comptroller-General and Minister of the Royal Household, except so far as the functions of the Comptroller-General were financial and bestowed upon the Minister of Finance (sec. 295); the Minister of *Public Instruction* (1848), *Religion* (1848), *and the Fine Arts;* the Minister of *Public Works;* the Minister of *Agriculture* (an office created in 1812, but afterwards abolished, to be revived in 1828–30); the Minister of *Trade and Industry;* and the Minister of *Posts and Telegraphs.* These last two offices were created in 1848 by subtraction from the department of the Interior.

324. **The Cabinet.** — As a Cabinet, the ministers represent the administration in the Chambers. They are commonly chosen

from amongst the members of the Houses; but, whether members or not, they have, as ministers, the right to attend all sessions of the Chambers and to take a specially privileged part in debate. The same right extends also to the Under-secretaries of Finance, of the Interior, of the Colonies, and of Fine Arts, who are, consequently, usually members of the Chambers.

A minister may speak at any time in the Chambers; not even the *clôture* (previous question) can exclude him.

In 1888 the Minister of War was without a seat in the Chamber.

325. **The Council of Ministers.** — As an administrative Council the ministers are, in official rank at least, subordinate to the President, who is the Chief Executive. The Council sits in his presence, though not under his presidency, but under that of a special 'President of the Council' chosen by the ministers from amongst their own number. Its duty is to exercise a general oversight of the administration of the laws, with a view to giving unity of direction to affairs of state. In case of the death, resignation, or incapacitation of the President of the Republic, the Council is to act in his stead until the National Assembly can meet and elect his successor. Its members are *ex officio* members of the Council of State, the highest judicial tribunal of the Republic for the determination of administrative cases (sec. 353).

326. **Relation of the Ministers to the President.** — The Council of Ministers is a body recognized by law, the Cabinet is not: it is only the ministers in consultation concerning matters affecting their political responsibility: it is, aside from such meetings for consultation, only a name representing their union in responsibility. But the two names, Council and Cabinet, furnish convenient means for making plain the various relations of the ministers to the President. As a Council they are, in a sense, his creation; as a Cabinet they are, in a sense, his masters. The Executive Departments, or Ministries, over which they preside are the creation, not of the Constitution or of statutes, but of the President's decree. No decree of the

President's is valid, however, unless countersigned by the minister whose department is affected. Any such decree must, too, almost necessarily affect the budget, and must in that way come within the control of the ministers and the Chambers. The ministers are the President's appointees; but he must appoint ministers who are in agreement with the majority in the Chambers, and they are responsible to the Chambers alone for their conduct in office. The President is the head of the administration; but his salary is dependent upon the annual budget which the Minister of Finance presents to the Chambers: and the items of the budget are matter of agreement between the ministers and the Chambers.

All these 'buts' are, of course, so many fingers pointing to the power of the Cabinet over the President. The ministers are not his representatives, but representatives of the Houses. In this capacity they control not the policy only, but also the patronage of the government. Naturally the President's appointments, needing, as they do, the countersignature of a minister, are in general the appointments of the ministers; and their appointments are too often bestowed according to their interest in the Chambers, — are too often used, in short, to be cast as bait for votes.

The patronage of office, indeed, threatens to become even more of a menace to good government in France than it has been to good government in our own country under the federal system of appointment. The number of offices in the gift of the ministers in France is vastly greater than the number within the gift of the President of the United States; and the ministers' need to please the Chambers by favors of any and all kinds is of course incomparably greater than our President's need to please Congress, since they are dependent upon the good-will of the Chambers for their tenure of office.

327. **Ministerial Responsibility.**— The responsibility of the ministers to the Chambers is not of law, but of custom, as in England. Their tenure of office is dependent upon the favor of the Houses simply because no policy of theirs

could succeed without legislative approval and support. They resign when defeated because they will not carry out measures of which they disapprove. In theory their responsibility is to both Houses; but, as a matter of fact, it is only to the Chamber of Deputies. The votes of the Senate alone seldom make or unmake Cabinets; that is the prerogative of the popular Chamber, which is more directly representative of the nation.

328. **Questions and Interpellations.**—The ministers may be held closely to their responsibility at every turn of their policy by means of various simple and effective forms of inquiry on the part of the Chambers. First of all is the direct question. Any member of either House may, after due notice given to the minister concerned, ask any question of the proper minister as to affairs of state; and an answer is demanded, by custom at least, to every question which can be answered publicly without detriment to the public interest. Next to the direct question, which is a matter between the individual questioner and the minister questioned, comes that broader form of challenging the policy of the Cabinet, known as the '*Interpellation.*' The simple questioner must first get the consent of the minister to hear his question; an *interpellation*, on the contrary, can be brought on without awaiting the acquiescence of the minister. It is a special and formal challenge of the policy of the Cabinet on some point of importance, and is commonly the occasion of a general debate. It is made a special 'order of the day,' and usually results in a vote expressive of confidence or want of confidence in the ministers, as the case may be. It is the question exalted into a subject of formal discussion: it is the weightiest form of interrogating ministers: it makes them and all that they have done the objects of set attack and defence. A third and still more formal method of bringing administrative acts under the scrutiny of the Chambers consists in the appointment of a Committee of Investigation.

329. Although their acts are thus constantly and thoroughly scrutinized, the ministers are, nevertheless, the leaders of the Chambers. They represent, for however short a time, the majority, and all measures which they propose are accorded a position of advantage in the business of the houses (sec. 333).

330. **The Course of Legislation.**— All propositions alike, whether made by ministers or by private members, have to go to a special committee for consideration before reaching a debate and vote by the whole House; but the propositions of private members must pass another test before they reach even a special committee. They must go first to the 'Monthly Committee on Parliamentary Initiative,' and it is only after hearing the report of that Committee upon bills submitted to it that the House determines whether particular measures shall be taken into further consideration and advanced to the special-committee stage. A vote of emergency taken upon the introduction of a measure can, however, rescue a ministerial bill from all committee handling, and a private member's bill from the delays of the Initiative Committee.

331. **The Committees.** — The committee organization of the Houses is worthy of special remark. Every month during the session, the members of the Chamber of Deputies are divided by lot into eleven, those of the Senate into nine, *Bureaux*. These Bureaux select four 'monthly committees,' one on 'Leave,' one on 'Petitions,' one on 'Parliamentary Initiative,' and one on 'Local Interests.' The Bureaux select, moreover, all the special committees to which bills are referred, except when the House chooses itself to elect a committee; and they themselves consider matters referred to them.

332. **The Budget Committee.** — All financial matters are considered by special standing committees chosen for one year; in the Chamber of Deputies by a Budget Committee composed of thirty-three members, and in the Senate by a Finance Committee composed of eighteen members; and these Committees, like other standing committees, arrogate to themselves some-

thing like absolute domination of the financial policy of the government, with the result of robbing financial legislation of order and consistency, and of sadly obscuring the responsibility of the ministers. Other committees simply consider and report upon ministerial measures; the Budget Committee undertakes often radically to revise, sometimes altogether to transform, ministerial proposals, originating when it was meant only to control.[1]

333. **Government by the Chambers.** —Ministerial responsibility has rapidly degenerated in France, during the past few years, into government by the Chambers, or, worse still, government by the Chamber of Deputies. Ministerial responsibility is compatible with ministerial leadership; and under a ministry which is really given leave to direct the course of public policy, the Chambers judging and controlling but not directing, that policy may have dignity, consistency, and strength. But in France the ministers have, more and more as the years of the Republic have multiplied, been made to substitute for originative leadership submissive obedience, complete servility to the wishes, and even to the whims, of the Chamber of Deputies. The extraordinary functions which have been arbitrarily assumed by the Budget Committee simply mirror the whole political situation in France. The Chamber has undertaken to govern, with or without the leadership of ministers. So capricious, so wilful has it been in its rejection of every minister who would not at once willingly serve its moods, so impatient indeed with all ministerial leadership, that almost every public man of experience and ability in France has now been in one way or another discredited by its action; and France is staggering under that most burdensome, that most intolerable of all forms of government, *government by mass meeting*, — by an inorganic popular assembly. It is this state of affairs which has called forth so loud a demand for a revision of the Constitution, and which has at the same time apparently created an opportunity for another return to some sort of dictatorship.

334. **Departmental Organization.** — Each minister is assisted in the administration of his Department by a 'Cabinet,' which must not be confounded with the Cabinet of ministers. The Cabinet of each Department is composed of such heads

[1] See the *Revue des Deux Mondes* for Nov. 1st, 1886, p. 226 *et seq.*

of the branches of the departmental service as the minister chooses to bring into special relations of confidence with himself. It stands towards the Department in a position somewhat similar to that which the Council of Ministers occupies towards the whole service of the government (sec. 325). It mediates between the several bureaux of the Department, distributes the matters laid before the Department among them, gives confidential advice to the minister, prepares all departmental matters which are to be brought before the Chambers, and serves generally as the unifying and directing organ of the Department.

335. **Departmental Functions.** —The possession of such a 'Cabinet' constitutes the one feature which all the Departments have in common: each Department having, of course, an organization adapted to the performance of its own peculiar duties. The main duties of most of the Departments are sufficiently indicated by their names. The *Ministry of Justice* controls the administration of civil, criminal, and commercial law; in other words, is set over the judicial system of the country. Not over the whole of it, however. The strict differentiation of functions insisted upon in France assigns to the Ministry of War, the Ministry of Marine, and the Ministry of the Interior respectively, the administration of military, marine, and administrative law. The *Ministry of Foreign Affairs* controls the relations of France with foreign countries. The *Ministry of the Interior* undertakes all duties not assigned to any other executive Department. That of *Finance* collects, handles, disburses, and accounts for the revenues of the state. That of *War* directs all military affairs. That of *Marine and the Colonies* has, added to the duty of managing the navy, the duty of acting for the colonies as all departments in one. The *Ministry of Public Instruction, Religion, and the Fine Arts*, organizes and oversees education, from the primary schools up to the University, mediates between church and state, buys works of art for the state, directs the public art-schools,

museums, and art-exhibitions, subsidizes the theatres, exercises a censorship over the drama, superintends conservatories and schools of music and oratory, and supervises the state manufactories of Sèvres ware and tapestry. The *Ministry of Public Works* is entrusted with the management of the public highways, including the railways, and of the state mines, with the inspection of shipping and the care of seaports and lighthouses, and with the direction of the schools of engineering and architecture. The *Ministry of Agriculture* is charged with the care of the forests, the proper irrigation of the country, oversight and assistance in the breeding of live-stock, sanitary regulations with reference to cattle diseases, and the administration of the various aids given by law to agriculture. The *Ministry of Trade and Industry* undertakes to provide for the interior commerce of the country the facilities afforded by special courts of law, bourses and chambers of commerce, duly commissioned middle-men and factors, life-insurance companies, savings banks, and accident funds, official examination and warranty of certain classes of manufactured goods, the policing of markets, and the granting of patents and trade-marks; for the foreign commerce of the country, it regulates duties and imposts, offers premiums for shipbuilding and seamanship, and collects statistics. A special 'Bureau for Industrial Societies' was added to this Department in 1886. The *Ministry of Posts and Telegraphs* sees to the carrying and delivery of the mails, and to the telegraphic service of the country.

The duties of most of these ministries illustrate the range of function assumed by the government in France (secs. 1234, 1235) more conspicuously than they illustrate the form and spirit of her political institutions. A mirror of the political life of France is to be found in the organization of the Ministry of the Interior, which is more largely concerned than any other Department with the multifarious details of local government.

Local Government.

336. France still preserves the administrative divisions created by the Constituent Assembly in December, 1789. Instead of the old system of ecclesiastical dioceses, military provinces, and administrative 'generalities' (sec. 300) with their complexities and varieties of political regulation and local privilege, there is a system, above all things simple and symmetrical, of *Departments* divided into Arrondissements, *Arrondissements* divided into Cantons, and *Cantons* divided into *Communes*. Much the most significant of these divisions is the Department: whether for military, judicial, educational, or political administration, it is the important, the persistent unit of organization; arrondissement, canton, and commune are only divisions of the Department, — not fractions of France, but only fractions of her Departments. The canton, indeed, is little more than an election district; and the arrondissement is only a fifth wheel in the administration of the Department. The symmetry of local government is perfect throughout. Everywhere the central government superintends the local elective bodies; and everywhere those bodies enjoy the same privileges and are hedged in by the same limitations of power.

337. The several parts of the system of local government in France will thus be seen to rest, not upon any historical groundwork, constituting each a vital whole, possessing traditions of local self-government from an older time of freedom, but upon a bureaucratic groundwork of system. If, therefore, France is now approaching confirmed democracy and complete self-government, as there is good reason to believe she is, at least where her politics are working their effects beyond the circle of Parisian influences, she is building, not upon a basis of old habit, fixed firmly in the stiff soil of wont and prejudice, but upon a basis of new habit widely separated from old wont, depending upon the shifting soil of new developments of character, new aptitudes, new purposes. Her new ways

run across, not with, the grain of her historical nature. Her self-government is a-making instead of resting upon something already made.

338. **The Department: the Prefect.** — The central figure of French administration is the Prefect, the legal successor of the Intendant. He is the agent of the central government in the Department. He is the recruiting officer of that district, its treasurer, its superintendent of schools,[1] its chief executive officer in all undertakings of importance, and the appointer of most of its subordinate officials. He fills a double capacity: he is the agent and appointee of the central government, and at the same time the agent of the local legislative authorities. He is at once member and overseer of the General Council of his Department; and he is necessarily its agent, inasmuch as he commands, as representative of the authorities in Paris, all the instrumentalities through which its purposes must be effected. A minister can veto any act of a Prefect, — for he is the representative of any minister who needs his executive aid in the Department, — but no minister can override him and act by his own direct authority. Until he is dismissed the minister must act through him.

The Prefect may take part in the proceedings of the General Council of the Department at any time except when his accounts are being considered.

339. Such is the legal position of the Prefect. His actual position is somewhat different. The politics of the Republic, one of whose tendencies has been to contribute by degrees to local self-government, is making the Prefect more and more the mere executive agent of the General Council of his Department, and has already made his office a party prize. He is appointed by the Minister of the Interior and is in law first of all and chiefly the representative of the Interior. But the other ministers also, as has been said, act through him in many

[1] He appoints and disciplines the teachers.

things. The result is that his office is often emptied and filled again upon a change of ministry. He no doubt, too, frequently owes his appointment to the favorable influence of the deputies and senators from his department with the Minister of the Interior (sec. 326 n.). He is, consequently, not the autocrat he was under Napoleon. He is, rather, the trimmer to local opinion too often found under popular governments.

340. **The Spoils System in France.** — French administration in all its branches, indeed, and in all grades of its service, from the lowest to the highest, has suffered profound corruption through the introduction of the fatal idea that public office may and should be used as a reward for party services. Ministries have adopted, all too readily, the damning practice of distributing offices among their party followers as pay for party activity, and even among the friends and constituents of deputies, in exchange for support in the Chamber. And of course, when short of gifts to bestow, they empty as many offices as possible of opponents or luke-warm friends in order to have them to give away. This policy is doubly fatal to good government in France because of the very frequent changes of ministry at present characteristic of her politics.

341. **The General Council of the Department.** — The legislative body of the Department is the General Council, which is made up of representatives chosen, one from each canton, by universal suffrage. Except during a session of the Chambers, the President of the Republic may at any time dissolve the General Council of a Department for cause. The election of representatives to the General Council, like the election of deputies, does not take place upon days set by statute, but on days set by decree of the President. Councillors are elected for a term of six years, one-half of the membership of the Council being renewed every three years. In order that members of the General Council may be in fact representatives of at least a respectable number of the voters of the cantons, the law provides that no one shall be elected on a first ballot unless voted for on that ballot by an absolute majority in a poll of at least one-fourth of the registered voters. Attention

having been called to the election by the failure of a first ballot, a plurality will suffice to elect on a second. In case of a tie, the *older* candidate is to be declared elected.

The membership of the Council varies in the several Departments, according to the number of cantons, from seventeen to sixty-two.

The General Council is judge of the validity of elections to its own membership; but it is not the final judge. An appeal lies from its decisions to the Council of State. A seat may be contested on the initiative either of a member of the Council, the Prefect, or a constituent of the member whose rights are in question.

342. There are two regular sessions of the General Council each year. The duration of both is limited by law: for the first to fifteen days, for the second to one month. Extra sessions of eight days will be called by the President of the Republic at the written request of two-thirds of the members. If the Council in any case outsit its legal term, it may be dissolved by the Prefect; if it overstep its jurisdiction in any matter, its acts are annulled by a decree of the President. The President has also a veto on all of its decisions. Members are liable to penalties for non-attendance or neglect of duty. They are, however, on the other hand, paid nothing for their services.

343. At the first regular session of the year the Council considers general business; at the second and longer session it discusses the budget of the department, presented by the Prefect, and audits the accounts of the year. At either session it may require from the Prefect or any other chief of the departmental service full oral or, if it choose, written replies to all questions it may have to ask with reference to the administration.

344. The supervisory and regulative powers of the General Council are of considerable importance; but its originating powers are of the most restricted kind. It has the right to appropriate certain moneys for the expenses of local government, but it has not the right to tax for any purpose. The amount

and the source of the money it is to use are determined by the Chambers in Paris. Even such narrowed acts of appropriation as it can pass have to be confirmed by presidential decree. Its chief functions are directory, not originative. It sees to the renting and maintenance of the buildings needed for its own use, for the use of the Prefect and his subordinates, for the use of the public schools, and for the use of the local courts; it regulates the pay of the police (*gendarmerie*) of the Department; provides for the cost of printing the election lists; supervises the administration of the roads, railroads, and public works of the Department; oversees the management of lunatic asylums and the relief of the poor. Most important of all, it apportions among the several arrondissements the direct taxes annually voted by the Chambers.

345. **The Departmental Commission.** — During the intervals between its sessions, the General Council is represented in local administration by a committee of its own members called the Departmental Commission, which it elects to counsel and oversee the Prefect. So long as this Commission keeps within its recognized prerogatives, it is treated as a committee of the General Council, and appeals lie from it to that body; but, let it push beyond its prerogatives, and it becomes responsible, not to the General Council whose committee it is, but to the central administration, through appeal to the Council of State. It is thus at once representative of the General Council and amenable to the Council of State.

346. **Central Control.** — The most noticeable feature of this system is the tutelage in which local bodies and the individual citizen himself are kept. Fines compel the members of the General Council to do their work, and then every step of that work is liable to be revised by the central administration. Irregularities in the election of a member are brought to the attention of the General Council by the Prefect, as well as by its own members or by petition from the constituency affected. If the Council oversteps the limits of its powers, it is checked

by decree, and not by such a challenging of its acts in the courts by the persons affected as, in English or American practice, strengthens liberty by making the individual alert to assert the law on his own behalf instead of trusting inertly to the government to keep all things in order. Even expression of opinion on the part of the General Council is restricted. It may express its views on any matter affecting local or general interests, 'if only it never express a wish which has a political character.'

347. **The Arrondissement** is the electoral district for the Chamber of Deputies, the members of the Chamber of Deputies being elected, as we have seen, not 'at large,' for the whole Department, but by Arrondissements, — not by *scrutin de liste*, that is, but by *scrutin d'arrondissement* (sec. 315). It is also an important administrative division which serves as a judicial district and as the province of a sub-prefect and an arrondissemental Council. The sub-prefect is the mere agent of his chief, the Prefect, and has only a few, hardly more than clerical, duties; the Council of the Arrondissement (*conseil d'arrondissement*), elected from the cantons, like the General Council of the Department, has no more important function than that of subdividing among the communes the quota of taxes charged to the Arrondissement by the General Council. For the rest, it merely gives advice to administrative officers appointed by the ministers in Paris.

348. **The Canton** is the electoral district from which members are chosen to the General Council and the Council of the Arrondissement; it marks the jurisdiction of the Justice of the Peace: it is a muster district for the army, and it serves as a territorial unit of organization for registration and for the departmental care of roads, but it has no administrative organization of its own. It is a mere region of convenient size for electoral and like purposes.

349. **The Commune** is the smallest of the administrative divisions of France, and, unlike the arrondissement and canton,

is as vital an organism as the Department. All towns are communes; but there is, of course, a much larger number of rural than of town communes.[1]

The general rule of French administration is centralization, the direct representation of the central authority, through appointed officers, in every grade of local government, and the ultimate dependence of all bodies and officers upon the ministers in Paris. In one particular this rule is departed from in the Commune. The chief executive officer of the Commune, the mayor, is elected, not appointed. He is chosen by the Municipal Council from among its own members, and is given one or more assistants elected in the same way.

Down to 1874 the mayors of the more populous communes were appointed by the authorities in Paris, the mayors of the smaller communes by the Prefects. Between 1831 and 1852 the choice of the appointing power was confined to the members of the Municipal Councils; but between 1852 and 1874 the choice might be made outside those bodies. From 1874 to 1882 the smaller Communes elected their mayors, indirectly as now. Since 1882 all mayors have been elected.

350. **The Communal Magistracy.** — The mayor and his assistants do not constitute an executive *board:* the mayor's assistants are not his colleagues. He is head of the communal government: they have their duties assigned to them by him. The mayor is responsible, not to the Council which elects him, but to the central administration and its departmental representative, the Prefect. Once elected, he becomes the direct representative of the Minister of the Interior. If he will not do the things which the laws demand of him in this capacity, the Prefect may delegate some one else to do them, or even do them himself instead. For cause, both the mayor and his assistants may be suspended, by the Prefect for one month, by the Minister of the Interior for three months, and all their acts are liable to be set aside either by Prefect or Minister. They may even be removed by the Executive.

[1] The total number of communes in France is 36,105.

In case of a removal it is the duty of the Municipal Council to fill the vacancies, and to fill them with other men; for removal renders the mayor or his assistants ineligible for one year.

One of the duties of the mayor is to appoint the police force and other subordinate officers of the Commune; but in Communes of over forty thousand inhabitants the mayor's composition of the police force must be ratified by decree, and in other communes all his appointments must be confirmed by the Prefect.

351. **The Municipal Council.** — There is in every Commune a Municipal Council (of from ten to thirty-six members, according to the size of the commune) which has, besides its privilege of electing the mayor and his assistants, pretty much the same place in the government of the Commune that the General Council has in the government of the Department. Its decisions, however, have not the same force that attaches to decisions of the General Council. The latter are valid unless vetoed; the former are not valid until confirmed; they must, for a certain term at least, await ratification. Unlike the General Council, the Municipal Council is liable to be suspended for one month by the Prefect; like the General Council, it may be dissolved by decree of the President passed in the Council of Ministers. It holds four regular sessions each year, one of which it devotes to the consideration of the municipal budget, which is presented by the mayor. Its financial session may continue six weeks; none of its other sessions may last more than fourteen days. The mayor acts as its president, except when his own accounts are under consideration.

Neither the Municipal Council nor the Council of the Arrondissement is judge of the validity of the elections of its members. Contested election cases are heard by the Prefectural Council (sec. 354).

Until 1831 the Municipal Council was chosen by the Prefect from a list of qualified persons made up in the Commune. Between 1831 and 1848 its members were elected by a restricted suffrage. Since 1848 they have been elected by universal suffrage.

In case of a dissolution of the Municipal Council, its place may be taken, for the oversight of current necessary matters, by a delegation of from three to seven members appointed by the President of the

Republic to act till another election can be had. This delegation cannot, however, take upon itself more than the merely directory powers of the Council.

352. **Oversight of the Commune.** — The Commune, though in many of its relations a subdivision of the Department, is not subject to the oversight of the General Council. This seems, of course, an anomaly, when looked at from the point of view of those who are accustomed to a system of local governments within local governments; and unquestionably the life of local government in France would be greatly quickened by giving to the organs of local government a large independence, and at the same time bringing them into relations of close interdependence to each other. But politics has "stolen into the General Council, although the legislators of 1871 took care to shut the door against it, and the view is common in France, whether rightly or wrongly, that the central administration is less partisan in the oversight of the Communes than the General Council would be." [1]

353. **Administrative Courts: the Council of State.** — So thorough is the differentiation of functions in France that actions at law arising out of the conduct of administration are instituted, not in the regular law courts connected with the Ministry of Justice, but in special administrative courts connected with the Ministry of the Interior (sec. 335). The highest of these courts is the Council of State, which is composed of the ministers, and of various high administrative officers of the permanent service. It is the court of last resort on administrative questions. It is also charged with the duty of giving advice to the Chambers or to the government on all questions affecting administration that may be referred to it.

354. **The Prefectural Council.** — Below the Council of State are the Prefectural Council, a Court of Revision, a Superior Council of Public Instruction, and a Court of Audit. These

[1] Lebon (Marquardsen), pp. 106, 107.

are not subordinate to each other: each is directly subordinate to the Council of State. The Prefectural Council is, of course, the most important of them. It has, amongst other weighty functions, that of determining the validity of elections to the Council of the Arrondissement and to the Municipal Council. For the rest, it has jurisdiction over all administrative questions, and over all conflicts between administrative authority and private rights. Its processes of trial and adjudication are briefer and less expensive than those of the ordinary law courts. In almost all cases an appeal lies to the Council of State.

The Prefect is the legal representative of the government in cases brought before the Prefectural Council; but that court is not at all under his dominance. It is composed of permanent judges, one of whom, at least, is usually of long administrative experience.

Each minister is himself a judge of first instance in cases whose consideration is not otherwise provided for, an appeal always lying from him, of course, to the Council of State. Prefects and mayors are, in like manner, judges of first instance in certain small cases.

The Administration of Justice.

355. **Ordinary Courts of Justice.** — The supreme court of France is the Cassation (Cessation) Court which sits at Paris. Next below it in rank are twenty-six Courts of Appeal, the jurisdiction of each of which extends over several Departments. These hear cases brought up from the courts of first instance which sit in the capital towns of the arrondissements. These last consider cases from the Justices of the Peace, who hold court for the adjudication of small cases in the cantons. By decree of the President, passed in the Council of Ministers, the Senate may be constituted a special court for the consideration of questions seeming to involve the safety of the state; and such questions may be removed by the same authority from the ordinary courts.

The appointment of all judges rests with the President, or,

rather, with the Minister of Justice; and the tenure of the judicial office, except in the case of Justices of the Peace, is during good behavior. In the case of Justices of the Peace, the President has power to remove.

356. **Jury Courts.** — In France, the ordinary civil courts are without juries; the judges decide all questions of fact as well as all questions of law. There are, however, special jury courts (*cours d'assises*) constituted four times a year in each Department for the trial of all crimes, and of political and press offences; and in these the jury is sole judge of the guilt or innocence of the accused; the judges determine the punishment.

The jury courts sit under the presidency of a member of the Court of Appeal within whose jurisdiction the Department lies in which the court is convened, and with him are associated two 'assessors.' The state is represented in each case by the state-attorney or one of his deputies. A jury of twelve is made up from lists prepared by commissioners of the cantons and arrondissements. These lists include the names of all Frenchmen within the Department who are thirty years of age, able to read and write, in enjoyment of all civil rights, and not disqualified or excused by law. Thirty-six jurors and four substitutes are taken from these lists for each quarterly session of the court; and for each case twelve of this number are drawn by lot, the state and the accused both having the right of peremptory challenge of the jurors drawn till but twelve names remain in the urn.

357. **Tribunal of Conflicts.** — Between the two sets of courts, the administrative and the ordinary, there stands a Tribunal of Conflicts, whose province it is to determine to which jurisdiction, the administrative or the ordinary, any case belongs whose proper destination, or forum, is in dispute. This Tribunal consists of the Privy Seal as president, of three State Councillors chosen by their colleagues, and of three members of the Cassation Court selected, in like manner, by their fellow-judges.

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VII.

THE GOVERNMENTS OF GERMANY

358. **The Feudalization of Germany** was in some points strongly contrasted with the feudalization of France. There was in Germany, of course, no Romanized subject population such as existed in Gaul, and whose habits entered there, like a leaven, into the polity of their conquerors. Beyond the Rhine all were of one general kin, all bred in the same general customs. What was new there was the great Frankish kingship of Merowingian and Carolingian, — the new size and potency of the regal power bred amidst the readjustments of conquering migration by the dominant Franks. For the rest, there was at first the old grouping about elective or hereditary princes, the old tribal individualities of custom, the old organization into separate, semi-independent, self-governing communities. Feudalism came, not so much through fresh gifts of land and novel growths of privilege based upon such fresh gifts, not so much through 'benefice' and 'commendation,' that is, the new adjustments of personal allegiance elsewhere (secs. 238–240), as through the official organization of the Frankish monarchy.

359. **Official System of the Frankish Monarchy: the Grafen.** — In order to exercise their kingly powers the more effectually, the Frankish monarchs adopted the natural plan, for which there was Roman precedent, of delegating their functions to officers commissioned to act as their representatives in various districts of their extensive domains. There

does not seem to have been any symmetrical division of the territory into districts to fit the official system. Here and there throughout the kingdom there were counts (*Grafen*), the king's vicegerents in the exercise of the financial, judicial, and military prerogatives of overlordship; but the limits of their jurisdiction were not always sharply defined. There were, for one thing, many exemptions from their authority within the general districts allotted them. There were the dignity and pretensions of provincial princes to be respected; more important still, there were the claims of the great landowners to a special jurisdiction and independent lordship of their own to be regarded. As a matter of policy such claims were generally allowed. The demesnes of the greater landowners were cut out from the administrative territory of the *Graf* and given separate political functions. Barons such as we have seen in France, — local autocrats with law courts and a petty sovereignty of their own, — were thus freely created. The king apparently could not deny them the 'immunities' they demanded.

360. **The Magistracy of Office and the Magistracy of Proprietorship.** — There thus grew up, side by side, as it were, a double magistracy — a magistracy of office and a magistracy of proprietorship. The *Graf* ruled by virtue of his office; the baron by virtue of his landed possessions: there were lords by privilege (*Immunitätsherren*), and lords by commission. Of course as time went on the two sets of magnates drew nearer and nearer to the possession of a common character through an interchange of qualities. The office of *Graf* tended more and more to become hereditary and to connect itself with the ownership of large estates. Heredity of title and prerogative was the almost irresistible fashion of the age: the men of greatest individual consequence, besides, — the men who were fit because of their individual weight to be delegated to exercise the royal authority, — were commonly the men of large properties. Either there went, therefore, along with the graf-

ship, gifts of land, or else men already sufficiently endowed with lands were given the office: and as the office connected itself with proprietorship it took from proprietorship its invariable quality of heredity. This was the double process: Grafs became hereditary territorial lords; and hereditary territorial lords acquired either the grafship itself or powers quite as great.

361. **Hereditary Chiefs.** — Add to this hierarchy the more ancient princes of the tribes, and the tale of greater lords is complete. These princes were, by traditional title at least, rulers of the once self-governing communities which Frankish ascendency had in the days of conquest united under a common authority. In many cases, no doubt, they retained a vital local sway. They were intermediate, in the new political order, between the king and the barons.

362. **Full Development of Territorial Sovereignty.** — By the thirteenth century German feudalization was complete. Princes (dukes), *Grafs*, and barons, had all alike become lords within their own territories (*Landesherren*). Bishops and abbots, too, as in France, had entered the competition for power and become themselves grafs and barons. That territorial sovereignty, that private ownership of political authority which is the distinguishing mark of feudalism, and which we have seen so fully developed in France, is present in as full development here in Germany also. But the elements of the development are very different in the two countries. In France we have seen the appointment of royal delegates come after the perfecting of feudalism and lead, through the gradual concentration of judicial and other authority in the king's hands, to the undermining and final overthrow of baronial sovereignty (secs. 296, 302). In Germany, on the contrary, the royal representatives, appointed while feudalism was taking shape, themselves entered and strengthened the baronage, quitting their dependent functions as officials for the independent functions of territorial lords. In France, in other

words, the appointment of judicial representatives of the Crown was an instrument in the hands of Louis IX. and his successors for the destruction of feudal privilege; feudalism was dissolved through office. In Germany, on the other hand, feudal privilege, instead of being eradicated, was created by the very same process; feudalism was fostered by office.

363. **The Markgraf.** — One office especially fostered feudal independence in Germany. Outside the hierarchy I have described, and standing in special relations with the king, was the *Markgraf*, — the graf of the *Mark* or border, set to defend the kingdom against inroads by hostile peoples. He was of course chosen chiefly because of his capacity in war, and was of the most imperative, masterful soldier breed of the times. To him, too, were necessarily vouchsafed from the first extraordinary powers. He was made virtual dictator in the unsettled, ill-ordered border district which he was appointed to hold against foreign attack; and he was freely given all the territory he could conquer and bring under the nominal authority of the king. It was thus that the Mark Brandenburg stretched out to the northeast to the inclusion of Prussia and other broad territory wrested from the once threatening Wends (secs. 382–393), and that the *Ostmark* established by Charles the Great as a barrier against the Hungarian increased till it became the great state of Austria (secs. 374–381). The authority of the kings over these masters of the border was necessarily very ineffectual. The *Markgraf* was not long in becoming virtually a ruler in his own right, little disturbed by the nominal suzerainty of a distant monarch, and possessed by fast hereditary right of the titles and powers which would one day make of him a veritable king.

364. **The Empire.** — Charles the Great set for his successors the example of a wide rule and a Roman title. He left none of his own race able to sustain a rôle as great as that which he had played; but, so soon as his direct line had run out, Saxon princes were found eager and able to revive the

great tradition and rehabilitate the Empire. The Carolingians kept alive the title of Emperor as a title of precedence to be borne by the elder line of descendants from the great Charles; but they divided his territories among them, generation after generation, in the old disintegrating Frankish way, and so cheated whomsoever of their number was called Emperor of any real Empire. It was thus that France and other territories became separated from the German portion of the Frank-lands, and set apart to work out histories of their own (secs. 252, 253, 270).

365. **The Saxon Emperors: Otto the Great.** — The great figure among the Saxon emperors, who succeeded the Carolingians, was Otto (936–973). Upon the extinction of the line of Charles, the nobles of the Empire had claimed the right to select their ruler, — a right which they long continued to exercise, and which they often abused by the deliberate choice of weak princes who would be unable to make the imperial authority too intrusive, to the upsetting of baronial pretensions; but which they seem at first to have exercised with some wisdom. Certainly the Saxon and Salian houses, which were selected to rule during the two centuries following the death of the last Carolingian, raised the imperial power to the height of its dignity and consequence. Had there been others like the greatest emperors of these Houses to succeed them, Germany, like France, might have won unity and realized nationality at the dawn, instead of at the noon, of the modern time.

366. The Saxon Otto, deservedly named 'the Great,' devoted the thirty odd years of his vigorous reign to the repression of the great duchies (Franconia, Bavaria, Swabia, Lotharingia) which, along with his own duchy of Saxony, had, in the days of the disintegration and decay of the Carolingian power, assumed a heady independence quite incompatible with real unity; to the defence of the Empire from the fierce and repeated attacks of the Hungarians, whom no energy less than his could have repelled; and to the rehabilitation of the Ger-

man power in Italy. In 962, after victories won in the Pope's behalf in Italy, he renewed in Rome the imperial office, to which, the dukes within his kingdom and the Hungarians without being the witnesses, he was able to give a vitality and ascendency scarcely inferior to those of its first estate under Charles the Great. His weakness, like that of all his successors, lay in a foolish striving after a power more extensive than he could possibly hold together, so long as the royal authority in Germany was not undisputed. Endeavoring to keep their hold upon Italy, Otto and his successors failed to make good, once and for all, their hold upon Germany. They fell between two stools. It was impossible for them to hold together in a common subjection both stubborn town-republics in Italy and refractory feudatories in Germany. Still Otto could make some show of success even in such a task; and even the less able successors of his own House handed on to the Salian princes who came after them a power not altogether squandered.

367. **The Salian Emperors: Henry III.** — The Salian House in its turn produced Henry III. (1039–1056) under whom the imperial authority reached its greatest height. Henry was for a time himself duke at once of three of the four great German duchies, Franconia, Swabia, and Bavaria, while the ducal throne of Lotharingia long remained vacant. That process of absorption by the Crown of all the greater feudal titles which was to consolidate France seemed to have set in also in Germany. But German royalty lacked the hereditary principle and the sustained capacity of a family of Capets.

368. **The Hohenstaufen: Frederic Barbarossa.** — The line of Salian emperors dwindled rapidly away after Henry III., and in 1138 there was brought to the imperial throne that family of Hohenstaufen which was to complete, through Frederic Barbarossa, the greatest of their line, the folly of Italian warfare. The reign of Frederic was one long, variable, and eventually

fruitless struggle with the republican cities of Lombardy. While the emperor spent all his resources in the south, Germany prepared to go to pieces so soon as his strong hand should be removed. Frederic was a man of heroic mould, equal to the greatest tasks of ruling, and so long as he lived, the imperial government was measurably potent and respected. But only such a one as he could wield the whip in such a way as to effect a steady discipline of the great feudatories. Even while he reigned, the forces of disintegration gathered head. Free cities sprang up which were afterwards to be not a little independent and masterful; the Bavarian Ostmark was erected into that duchy of Austria which was one day to grow into the mistress of Germany; and the Bohemian duke (Vladislav) received that royal crown which was to lift Bohemia into the front rank among the German states of the disintegrate Empire.

369. **The Interregnum and the Electors.** — Almost immediately after the death of the last of the Hohenstaufen emperors (1254) came an interregnum, — a period of "fist-law" (*Faustrecht*), as the Germans themselves called it, — which was eventually to bring forth a new constitution for the Empire. Just after the expiration of the Carolingian line, as I have said, the German princes had claimed and exercised the right to elect the Emperor upon each occasion of the falling vacant of the office (sec. 365). Of course the tendency of the time, which was for privileges to fall into the possession of the strongest, to remain with them through hereditary right so long as they continued strong, led to the gradual limitation of the electoral power to a few only of the leading spirits among the greater ecclesiastical and temporal feudatories. The Interregnum was brought about by a factional fight among these electors. One party elected and crowned at Aachen (the titular capital of the Empire since Charles's time) Richard of Cornwall, a son of John of England; but another party among the princes elected Alphonso of Castile, a great-grandson of Frederic Bar-

barossa, refused to recognize Richard as Emperor, and plunged the country into a dreary civil war of seventeen years (1256–1273), during which there really was no imperial government at all. For Alphonso did not come to claim the half crown thus equivocally offered him, Richard made no headway towards real emperorship, and anarchy worked its full confusion. The barons of the torn kingdom assiduously set about making themselves more independent than ever; some of them openly devoted themselves to robbery and made a trade of lawlessness; the towns drew together for a government of their own which would enable them to dispense with emperors;[1] every element of disintegration acquired its full potency; and the Empire seemed finally to have gone to pieces.

370. **The First Habsburg Emperor.** — At length, in 1273, the electors agreed upon Rudolf, Count of Habsburg, as Emperor. Habsburg was a petty feudal estate in Switzerland: but the electors seem to have selected its count for the very reason that he was not powerful. For more than seventy years they made it their settled policy to have none but weak princes on the throne, in order that no too great centralization of power might cheat them of their own unlawful independence. They even degraded the imperial office by shamelessly selling it to the richest of rival candidates: they did not so much as keep faith with purchasers of the dignity, but sold it sometimes to more than one aspirant at once. Rudolf, however, proved strong enough to lay the foundations for the future supremacy of his House. His chief rival for the imperial crown had been Ottocar, king of Bohemia, the most powerful prince of the Empire, and Ottocar's disappointment and resentment at not receiving the coveted honor were so great that he refused to acknowledge Rudolf as his suzerain. Rudolf, consequently, immediately undertook to compel his submission,

[1] This was the period of the formation of the Hanseatic and Rhenish leagues mentioned sec. 246.

and so complete was his success in a battle on the Marchfeld (1278) that he wrung from Bohemia, besides other territories, that duchy of Austria upon which the Habsburgers were to erect much of their future greatness. Rudolf's election to the throne had at any rate given to the house of Habsburg its initial opportunity. Rudolf's son, Albert of Austria, also won the crown, and Frederic of Austria soon after figured as rival to Lewis of Bavaria, for the imperial title; but Habsburg's time was not yet: Bohemian princes were to interpose a long line of emperors before Austria should finally realize her ambition.

371. **The Golden Bull.** — From 1347 to 1437 there were, with one interruption, emperors of the Luxemburg-Bohemian line; and the first of these, Charles IV. (1347–1378), is especially notable as having been instrumental in the promulgation of that Golden Bull which was to continue to be the fundamental law of the Empire for four hundred and fifty years (1356–1806). This celebrated law was issued by Charles, with the concurrence of an imperial Diet, consisting of princes and representatives of the free cities, in 1356. It determined who should be the electors of the Emperor and how they should exercise their electoral functions. It was once and for all settled that the electors should be the following seven: the Archbishop of Mainz, the Archbishop of Trier, the Archbishop of Cologne, the king of Bohemia, the Count Palatine of the Rhine, the Duke of Saxony (Wittenberg), and the Markgraf of Brandenburg. To each elector there attached a great imperial office: the three archbishops were respectively arch-chancellors of Germany, Italy, and Burgundy; the king of Bohemia was cupbearer; the Count Palatine, seneschal; the Saxon duke, marshal; and the Brandenburger, chamberlain. It seems to have been the theory that it was these offices which conferred upon their possessors their prerogative as electors; but of course the fact was quite other: the office had been tacked on to the prerogative.

Had the final choice of electors been made in the earliest days of the Empire, it would doubtless have been otherwise bestowed. It would have been natural in any case that the archbishops of Mainz, Trier, and Cologne should be preferred, for they had long been the greatest spiritual magnates of the Empire; but at an earlier date the four temporal votes would have gone to the great duchies of Franconia, Saxony, Swabia, and Bavaria. As it was, in 1356 none of these duchies any longer existed whole. Two of them, Franconia and Swabia, had become entirely extinct: the place of Franconia as a principality had been taken by the Palatinate of the Rhine, that of Swabia by Brandenburg. The Count Palatine and the Markgraf of Brandenburg accordingly received electoral votes. Saxony had been divided between the houses of Saxon-Wittenberg and Saxon-Lauenburg, of whom the Golden Bull preferred the former. The Duke of Bavaria was of the same house as the Count Palatine, and two votes were not to be given to one family. Bohemia was new, but too powerful to be excluded.

The Bull lays down "a variety of rules for the conduct of imperial elections. Frankfort is fixed as the place of election; the Archbishop of Mentz (Mainz) named the convener of the electoral college; to Bohemia is given the first, to the Count Palatine the second place among the secular electors. A majority of votes was in all cases to be decisive."[1]

There had long been seven electors; the Golden Bull only decided the claims of rival parts of houses, confirmed Bohemia in its vote, and fixed the procedure.

372. **Imperial Cities.** — One of the most important developments of the thirteenth century in Germany, — the period of the Interregnum and of the extremest feebleness and subordination of the imperial power, — was the rise of the free imperial cities. The cities of the Empire had, as feudalism developed, fallen into its order in two classes. Some of them held their privileges of the Emperor himself, were his immediate vassals; others were subordinated to some feudal lord and were subjects of the Empire only through him. The position of those immediately dependent upon the Emperor was much more advantageous than the position of those who had lesser and nearer masters. The imperial supervision was apt to be much less exacting than the overlordship of princes who, having less wide

[1] Bryce, *Holy Roman Empire*, 8th ed., p. 231.

interests to care for than those which busied the Emperor, could render their power greater by concentration. They were always near at hand and jealous of any movement of independence on the part of the towns within their domain; the Emperor, on the other hand, was often far away and never by possibility so watchful. He was represented always by some deputy; but the presence of this officer did not greatly curtail municipal self-government. In the thirteenth century even this degree of control was gotten rid of at the suit of some of the cities. They were allowed to become 'free' imperial cities, bound to the Emperor only by sworn allegiance, not by any bonds of actual government. The next step in the acknowledgment of their independence and importance was their admission to representation in the Diet of the Empire — and such recognition was not long delayed. The rôle of these great free cities in imperial affairs became one of the most important of the many independent rôles played on the confused stage of that troubled time. Lübeck, Hamburg, and Bremen retain to this day a certain privilege of position as free cities in the German Empire (secs. 402, 405).

373. **The Swiss Confederation.** — Almost at the very time that the Habsburgs first won the imperial crown and acquired the duchy of Austria, some of their Swiss dependencies broke away from them, and established an independence never since permanently broken. Schwyz, Uri, and Unterwalden, the sturdy little mountain communities grouped about the southern end of quiet Lucerne, with whose struggle for freedom the glorious story of the Swiss Confederation begins, contained some part of the estates of the Counts of Habsburg, whose hereditary domains touched the other end of Lucerne, and stretched wide to the north about the further shore of Lake Geneva, and southward again on the West. The region of the Alps contained the notable imperial cities of Zürich, Berne, Basle, and Schaffhausen; and Schwyz, Uri, and Unterwalden claimed to be immediate vassals of the Emperor, as these cities were. The Counts of Habsburg, in despite of this claim, sought to reduce them to submission to themselves. The result was a long struggle in which the three little cantons, at first joined only by their neighbor canton, Lucerne, but afterwards by Zü-

rich, Glarus, Zug, and Berne, were eventually completely victorious. By the formation of this famous league of free cantons and cities, at first known as the "Old League of High Germany," but ultimately as Switzerland (the land of Schwyz), there emerged from the German Empire one of the most interesting states known to history. It may be said to have been the offspring of the disintegrating forces of the Empire, — a living proof of its incoherence. In the next chapter we shall consider its political development with the special attention which it merits.

374. **Austria and the Empire.** — Having acquired the duchy of Austria, the House of Habsburg was no longer dependent upon its fortunes in the Alps; a forest canton more or less could make no controlling difference in its political career. In 1438 the Dukes of Austria, who had meantime added to their possessions Carinthia and Tyrol, ascended the imperial throne, to hand its titles on to their descendants in a direct succession broken by only two interruptions of a single reign each, till what remained of the Empire should be destroyed by Napoleon in 1806. That process which had taken place both in England and in France and which might have taken place at the same early time in Germany, had not Carolingians, Saxons, and Salians all alike so soon failed of male heirs, and had not the Roman Church planned to keep alive through imperial elections her influence in the Empire which she had created and named 'Holy,' now at last became operative in the country of the seven electors. The imperial crown became hereditary. The electors continued with singular perseverance to go through the forms of election; but, though they twice chose outside the House of Austria,[1] they usually confirmed the choice of nature by electing each time the natural heir of the Habsburger just dead.

375. **Maximilian I.** — During the first century of its uninterrupted rule the House produced a man worthy, as men go, to found a dynasty. Maximilian I. (1493–1519) was, on the whole, a very able prince; more important still, he was the

[1] In 1742 they elected Charles VII. of Bavaria, and in 1745 Francis I. of Lorraine (sec. 380).

most powerful prince of his line. The power of a German emperor depended not on his authority as Emperor, but upon what he was besides being Emperor. Maximilian possessed all the estates once divided among various branches of his family, and was therefore the most sovereign duke Austria had yet known; he had, besides, married Mary, the daughter and heir of Charles the Bold, and had thus come into possession of many of the great estates which had made the House of Burgundy a formidable rival of the most powerful kings. It was with such power behind him that he became Emperor. With him, it has been said, the Holy Roman Empire changes its character and becomes exclusively German. The Holy Roman Empire was elective and was dominated in large measure by ecclesiastical influences; the German Empire of the Habsburgers is hereditary and strictly political. The Holy Roman Empire was essentially a creation of the Middle Ages, was a device for holding together diverse feudal elements under the outward appearance of a whole; the German Empire is a modern organization intended to secure the dominance of a single great state. It emerges as the light of the Renaissance begins to spread over Europe, as America is discovered, and all mediæval bonds are broken. Men did not perceive this at the time, but such was nevertheless the case.[1]

376. **Maximilian's Reforms.** — The reforms which Maximilian was able to accomplish in the administration of the Empire were not great, but they at least bore promise of a much-to-be-desired consolidation of the imperial power. Even the Emperor's powerful feudal subjects were willing to aid in the work of unification. A diet at Worms in 1495 proclaimed a perpetual public peace and established an Imperial Chamber (*Reichskammergericht*) which was intended to give to the Empire a unified and authoritative administration of justice; and another Diet, later in the reign (1512), divided the Empire, for

[1] See Bryce, pp. 312 *et seq.*

the better keeping of the peace, into ten administrative districts, which were to serve as a territorial framework for the exercise of the imperial authority. Each district (or "circle," as it was called) had its own judicial council, a sort of local imperial chamber, which, like its prototype, the central Council, was empowered to settle all disputes which threatened the public peace. The system was one which promised centralization, but did not give it. There was still, as it turned out, little vitality, little reality in the connection between central and local authorities. The Empire's parts administered themselves rather than were administered.

The ten circles comprised no less than two hundred and forty separate 'estates' of the Empire, although Bohemia, Prussia, and Switzerland were left out as already practically independent. This astonishing number, which still excluded the lesser feudatories like the imperial knights, conveys some idea of the piece-meal political condition of the Empire.

377. Although these reforms did not result in any very satisfactory system or in any permanent energizing of the central imperial power throughout the Empire, yet they were typical of a hopeful tendency towards German national unity. Maximilian was able to establish a permanent army (it was the era when gunpowder was driving the old feudal levies out of existence and necessitating the drill of standing forces), to introduce a system of imperial police, and to organize a public letter post. The functions of the Imperial Chamber, too, gradually passed into the hands of a smaller court more immediately under the control of the Emperor. The House of Habsburg was at any rate secure in its ascendency.

378. **The Habsburg Marriages.** — From the reign of Maximilian I. to the Napoleonic wars at the opening of the present century the history of Germany as an Empire is hardly more than the political history of Austria. The most str
feature of the period is the wonderful growth of H
power by means of a most extraordinary series of

marriages, which made contemporaries say that what Mars gave to others Venus gave to the House of Austria. Maximilian I., as we have seen, married Mary of Burgundy and so added to Austria the territories of that great House. The son of this marriage, Philip the Fair, Archduke of Austria, married Joanna, the heiress of Aragon and Castile, and so brought into the world that greatest figure of the house of Habsburg, Charles V., master of Spain and her American possessions, of the Netherlands, and of Austria, with all that depended upon these, the dreaded rival of every independent power in Europe (1519–1556). It was this Charles who, bidding for the political co-operation of the Papacy against Francis I. of France, threw his weight against Luther in the great Diet at Worms and so inaugurated the momentous contests of the Reformation which were to issue in the terrible Thirty Years' War. After his abdication the vast double domains of the House were separated. Charles's son Philip received Spain and the Netherlands, his brother Ferdinand Austria and the imperial succession: there being thus established a Spanish and an Austrian branch of the Habsburg line which were henceforth to have separate histories.

379. **The Thirty Years' War** (1618–1648), which began as a religious war with the revolt against the Empire of the Protestants of Bohemia, degenerated in its last stages into a general European war of aggrandizement, and ended with a general redistribution of border territory amongst Sweden, France, Brandenburg, and Austria, which emphasized the internal antagonisms of the German States, but which left the House of Habsburg in much the same position as of old. Austria remained still head of the Empire, though the imperial 'estates' were left free to act for themselves in all matters which did not immediately affect imperial interests, — were given, *i.e.*, what was called "territorial superiority" (*Landeshoheit*) — and a permanent Diet was presently (1663) constituted at Regensburg, in whose hands a more definite imperial constitution began

to be developed. Perhaps the most important result of the peace (of Westphalia) was the acknowledgment of the independence of Switzerland and the Republic of the United Netherlands.

380. **Until 1806.** — The eighteenth century is marked for Germany (1) by the War of the Spanish Succession which resulted (Peace of Utrecht) in the failure of the claim of the Austrian Habsburgers to the throne of Spain and in the recognition of Prussia (Brandenburg) as a kingdom (sec. 392); (2) by the War of the Austrian Succession, which arose out of the failure of the male line of the House of Austria[1] (the possessions of the House falling to Maria Theresa), which practically ended with the election of Francis of Lorraine, the husband of the Austrian heiress, to the imperial throne, securing to Habsburg-Lorraine the Habsburg succession, and which resulted in the loss by Austria of Silesia to Frederic the Great of Prussia (Peace of Aix-la-Chapelle, 1748); (3) by the Silesian wars, the last of which was called the Seven Years' War (1756–1763), which arose out of the reopening of the contest between Austria and Prussia for the possession of Silesia, and which resulted in the final confirmation of the title of Prussia, a title rather of might than of right (Peace of Hubertsburg, 1763); (4) by the legal and ecclesiastical reforms whereby Joseph II., son of Maria Theresa, partially liberalized and rehabilitated the Austrian Empire; and (5) by the leagued opposition of German princes, acting under the leadership of Frederic of Prussia, to the attempt of Joseph to absorb Bavaria by transferring its heir to the Austrian Netherlands.

381. **End of the Old Empire.** — This last event was upon the eve of the French Revolution: and that revolution eventually brought forth Napoleon Bonaparte, whose sweeping conquests forced Francis of Austria to abdicate the imperial office in 1806, and so brought to an end at once the real German

[1] This was the period (1742–1765) of the election of Charles of Bavaria and Francis of Lorraine to the imperial dignity.

Empire which Maximilian had founded, and the tradition of the Holy Roman Empire which ran back to the great Charles and the year 800.

382. **Austria's Rival, — Prussia.** — Meantime a rival to Austria had grown up in the north, out of the North Mark established by Henry the Fowler in 930 as the Empire's barrier against the Wends (sec. 363). North Mark as well as East Mark had waxed great and independent; they now stood face to face, the two great border kingdoms, in a rivalry which was to have the most momentous influence upon German history.

383. **The Mark Brandenburg.** — The original North Mark, — afterwards known as the *Altmark*, or Old Mark, — was a small district upon the left bank of the Elbe, where the river turns decisively and finally northwest on its way to the North Sea.[1] The Elbe then constituted the northeastern limit of the Frankish kingdom; neither Carolingian nor Saxon emperors had been able to maintain a permanent foothold beyond it. They had gained a fringe of territory on the right bank of the stream, only to lose it again to the Wends, its sturdy Slavonic masters. In 1134, however, the Emperor conferred the Mark upon one Albert of the powerful house of Anhalt, who has come down to us as 'Albert the Bear,' a man of daring and energy of the sort that loves strenuous contests with the foes both of circumstance and of the battle-field. Before him the stubborn heathen gave way. He pushed beyond the river and began rapidly to widen the North Mark into a great territory which should have the Elbe at its back instead of at its front in facing the barbarians beyond. Albert's successors, though not so capable and masterful as he had been, were able pretty steadily to advance the work which he had begun. Step by step they pushed their conquests on till the next great river of the north, the Oder, had been reached, till even the Oder

[1] About sixty-five miles northwest from Berlin.

had been passed, and both Mecklenburg between the rivers, and Pomerania beyond, had been brought under their power, and two-thirds of the southern shore of the Baltic acknowledged them as masters. The House of Anhalt continued to furnish Markgrafs for this great task of conquest for almost two hundred years (1134–1320), — the period which saw the rise and fall of the Hohenstaufen, the Interregnum, and the greatest degradation of the imperial office, — a period consequently of the greatest opportunity for independent action and self-aggrandizement on the distant northern borders.

384. And Anhalt did its work thoroughly. It not only conquered, but also colonized. Great numbers of colonists both from Holland and from the more southern Teutonic lands were brought into the newly acquired territory; fully one hundred towns are said to owe either their foundation or their refoundation on a Germanic basis to this time. The land was thoroughly Teutonized, with the double benefit of a new and vigorous population and a new fertility and wealth, — for the new-comers coaxed the barren soil of the country into an unwonted productiveness, and the towns created and rapidly developed an unaccustomed trade. Meantime the country, so much extended beyond the narrow area of the Old Mark, had become the "Mark Brandenburg," a name which it took from its new capital city, once a stronghold of the Wends under the name Branibor.

385. **Independence of the Markgraf.** — Under the House of Anhalt, too, the Mark had undergone more than territorial expansion and material development: it had undergone also a significant political transformation. The Grafs of the old North Mark had not generally assumed to be more than officers of the Empire, the Emperor's lieutenants on the border. Probably even Albert the Bear fully acknowledged this complete subordination of his functions to the control of the imperial will. But by the time the North Mark had expanded into the Mark Brandenburg, the Markgrafs, secure in hereditary pos-

session of their office, had begun to act not as real officers, but only as nominal vassals of the Empire. They ruled their domain with a peculiar potency, moreover. Not many great estates were developed in Brandenburg during the early periods of its development. Most of the immigrants held directly of the Graf: there were few, except the burghers of the fast-growing towns, to dispute his complete supremacy. It looked as if a kingdom of unprecedented homogeneity and compactness were a-making in the lands between the Elbe and the Oder.

386. **Anarchy in Brandenburg.** — But before any such process could work itself out the heirs of Anhalt failed, and the Mark fell to the Emperor as a lapsed fief. From 1324 to 1373 it was held by the imperial House of Bavaria;[1] from 1373 to 1411 by the House of Luxemburg; and during these eighty-seven years anarchy and dissolution worked a constant work of destruction. The Anhalt grafs had made the government and extension of the Mark their chief concern, and so had kept it well in hand, both against disorder within and covetous neighbors without; but to the Bavarians and Luxemburgs Brandenburg was a mere appendage to other more important possessions. They were absentee lords; and in their absence their Mark land rapidly slid towards ruin. Lawlessness such as the whole Empire had strained under during the Interregnum now wrenched government from its foundations in the neglected Mark. The more powerful vassals hastened to fortify themselves in the special privileges of a virtual independence; nobles became highwaymen; towns that could escape the clutches of neighbor barons escaped also all control of the legitimate government; and every prince whose territories touched those of Brandenburg helped himself almost as he listed to such parts of the apparently doomed

[1] It was during the tenure of Bavaria that the right of Brandenburg to a vote in the electoral college was acknowledged by the Golden Bull (sec. 300).

Mark as most tempted or could least withstand him. It looked as if Anhalt's work was to be utterly undone and Brandenburg become common spoil for Germany.

387. **The Hohenzollern.** — Just in time, as it would seem, a House capable as any to reconstitute the torn domain and as interested as any to identify its fortunes with their own, came into possession of the diminished authority of the markgrafship. This was the now famous House of Hohenzollern. This House, a branch of the Swabian Zollern, had been invested, in 1192, with the burggrafship of Nürnberg. The Burggraf of Nürnberg, like the Markgraf of the North Mark, was originally an imperial officer; but the burggrafship became hereditary and semi-independent like all other grafships (sec. 360); and in the hands of the Hohenzollern it had attained to a very great power and importance. Gradually piece after piece of the territories about Nürnberg was absorbed until both Ansbach and Bayreuth were included in the possessions of the ambitious burggrafs, and the Hohenzollern had taken their place among the most important princes of the Empire. Sigismund of Luxemburg, who was elevated to the imperial throne in 1410, was probably in debt to Frederic of Hohenzollern, the Burggraf of Nürnberg, for stanch support against his rivals in the imperial race. At any rate he created Frederic Markgraf of Brandenburg in 1411. Twenty-seven years afterwards, upon the death of Sigismund, this same Frederic aspired to succeed him, but Albert, the first of the continuous line of Habsburgers, was chosen. The day for the real rivalry between Habsburg and Hohenzollern was not yet. The Brandenburger had first to nurse his power to its full stature.

388. **The Dispositio Achillea.** — Nothing, perhaps, contributed more to the ultimate supremacy of Brandenburg in Northern Germany, than the wise provisions speedily adopted by the Hohenzollern concerning the manner in which their new territory should be handed on by inheritance. They not only recompacted the Mark by restoring firm government,

retaking some of its stolen parts, and stamping out the threatening internal divisions between noble and noble; they also determined that they would not themselves divide the domain. A family law was promulgated by the Markgraf Albert 'Achilles' (1471–1486) which forbade any division of the Mark lands or of the estates of Ansbach and Bayreuth. These latter and the Mark might be separated from each other; but neither was to be partitioned within itself. This is known as the *Dispositio Achillea*, and has justly been regarded as one of the principal foundation stones of Hohenzollern predominance. For in thus consolidating the power of their House by adopting the principle of primogeniture, the new masters of Brandenburg were beforehand with the rest of Germany. Elsewhere noble families were constantly dissipating carefully cumulated power by partitions amongst heirs. The Hohenzollern, on the contrary, though they did not, for a generation or two after the *Dispositio*, quite strictly hold to their new rule of inheritance, adhered to it closely enough eventually to preserve their power whole. Thereafter every acquisition added to the compact mass.

389. **Joachim II.** — Later Hohenzollern showed a capacity for legal reforms of another kind. Joachim I. (1499–1535) established at Berlin a supreme court to give unity to the administration of justice; and, in order to give unity also to the law, introduced the Roman Code as a convenient substitute for a perhaps impossible systematization of the heterogeneous customs native to the Mark. The reign of Joachim II. (1535–1571) marks a sort of turning point in the history of Brandenburg; for it was then that the power of the Elector and the influence of the 'estates' of the Mark, — the nobles and the municipalities, — were most nearly at an equilibrium. Immediately afterwards the towns declined, and all circumstances shaped themselves in favor of the Elector and against a continued control of affairs by the 'estates.' More important still, Joachim identified himself with the Protestant side in the great controversy of the Reformation, and from him dates that

steady Protestantism of the House of Hohenzollern which came eventually to constitute a chief part of its claim to lead Germany in opposition to Catholic Austria. It was this Joachim II., too, who prepared much of the later history of his House by obtaining from the Duke of Prussia, in 1569, assent to a solemn covenant that when the then ducal line should run out the duchy should pass to Brandenburg. In 1618 the compact was fulfilled, and John Sigismund of Hohenzollern became also Duke of Prussia.

390. **Prussia** was a district of considerable size, lying between the rivers Vistula and Memel at the southeast extremity of the Baltic. It had been taken from the Lithuanian inhabitants between the years 1230 and 1283 by the Teutonic Knights, who were out of congenial employment since the end of the fighting in Palestine and were eager for a stirring new crusade against the heathen of Northern Europe. The Knights colonized and organized their conquests much as Albert the Bear and his successors had colonized and organized Brandenburg. For more than a century they held their possessions in virtual independence; but in 1467 they were compelled to acknowledge themselves subject to Poland. In 1511 the effort of the Order to govern as an Order had been abandoned, and East Prussia had been erected by Albert, a Franconian Hohenzollern, Grand-Master of the Order, into a duchy held as a fief of Poland. The Prussia, therefore, to whose ducal throne John Sigismund succeeded in 1618 was a fief of Poland, and was separated from Brandenburg by the wide expanse of West Prussia, a large district extending from Pomerania to the Vistula, which had once been part of the domain which the Teutonic Knights had won, but which was now an integral part of the territory of Poland.

391. **"The Great Elector."** — But in 1640 there came upon the stage a Hohenzollern who was to force upon his neighbors numerous changes in the political map. This was Frederic William (1640–1688), ever since honored with the name of the

Great Elector. By the Peace of Westphalia, Frederic William obtained Magdeburg and most of Pommerania (which in a previous time of disintegration had been absorbed by Sweden). In 1657, by skilful playing of a double part in a war between Sweden and Poland, he extorted from the latter a relinquishment of her feudal rights over Prussia, and so made it a free duchy. One-third of his territory at his death lay outside of the Empire and owned no master but himself. Inside his dominions he established absolutism. In Brandenburg the towns had greatly declined; and the nobles had abdicated their control over the Elector by granting him a permanent income, so that only management and force of character were needed to make the Elector's will supreme there. In Prussia he did not scruple to make force his instrument in establishing absolutism.

392. **The Kingdom of Prussia.** — Frederic, son of the Great Elector, used the power left him by his father to give weight to intrigues whereby he finally got the consent of the Emperor to his assumption of the title of King of Prussia. The Emperor would not consent to the erection of a new kingdom within the Empire; but Prussia lay outside the Empire; Frederic might call himself King of Prussia. Frederic accordingly crowned himself with great impressiveness and pomp at Königsberg in Prussia, becoming King of Prussia *and* Elector of Brandenburg. The greater title speedily swallowed up the less. The King of Prussia was an independent monarch; the Elector of Brandenburg was still a subject of the Empire. The Elector always preferred, consequently, to be known by the title of greater dignity. A brief time and the natural result will follow: instead of Brandenburg's giving its name to Prussia, Prussia will give its name to Brandenburg.

393. **Frederic the Great.** — Frederic, the first king of Prussia, governed from 1688 to 1713. His son, Frederic William I. (1713–1740), rounded out Brandenburg's possessions in Pommerania, and hoarded the money and prepared the army with

which his son, Frederic the Great (1740–1786), was to complete the greatness of Prussia. The great Frederic took Silesia from Austria, as we have seen (sec. 380), and then, joining in the heartless and scandalous partition of Poland in 1772, filled up the gap between Brandenburg and East Prussia with West Prussia and the Netze district, territory already thoroughly German. The second and third partitions of friendless Poland in 1793 and 1795 added to Prussia the districts known now as South and East Prussia.

Prussia was now ready for her final rivalry with Austria for the leadership of Germany; but first there was to be the great storm of the Napoleonic wars, which was to sweep away so much, besides the Empire, that was old in German political arrangements, and create the proper atmospheric conditions for German nationality.

394. **Napoleon: the Confederacy of the Rhine.** — One of the earliest acts of Napoleon in his contest with Austria and Prussia was to isolate these two great German states by thrusting between them a barrier of smaller German states attached to the French interest. So little coherent was Germany, so little had the Empire made of the Germans a single nation, that Napoleon was able to detach from all alliance with either Austria or Prussia every one of the German states except Brunswick and the electorate of Hesse. Of these the chief were, of course, the kingdoms of Bavaria and Württemberg and the grand-duchy of Baden. Napoleon organized out of these allies the so-called 'Confederacy of the Rhine,' of which he constituted himself 'Protector,' and which lasted from 1806 till 1813.

But, despite the ease with which he at first divided Germany in order to conquer it, Napoleon discovered at last that he had himself aroused there a national feeling which was to cast him out and ruin him. In 1813 Germany rose, the Confederacy of the Rhine went to pieces, and all Napoleon's plans were undone. He had done Germany the inestimable service of making her patriotic.

395. **The German Confederation** (1815–1866). — The Congress of Vienna, which met at the close of the Napoleonic wars to recompose Europe, had no less a task than the formal undoing of all that Napoleon had done. It could not, however, revivify the German Empire: that had been dead for some time before Napoleon forced a winding up of its affairs. Germany was not to remain disintegrate, nevertheless. In 1815 was formed the German Confederation which, loose as it was, united the German states more closely than they had been united for many generations. Austria was the president of the Confederation; its organ was a Diet of ambassadors from the thirty-nine component states (kingdoms, duchies, cities, principalities), which was to mediate between the states in all matters of common concern; and the Confederation maintained an army of thirty thousand men. The arrangement was little enough like union: the large states had a preponderant representation in the Diet, Austria dominating all; and each state, whether great or small, was suffered to go its own way, make its own alliances and fight its own wars, if only it refrained from injuring any one of the Confederates or the interests of the Confederation. But there was sufficient cohesion to keep the states together while German national feeling grew, and while the political revolutions of the century (1830 and 1848) liberalized political institutions.

396. **Period of Constitutional Reform.** — In 1848 most of the German states, except Prussia, granted to their people constitutional government. In the same year a 'German National Parliament' met at Frankfort (the seat of the Diet of the Confederation) and attempted to formulate a plan for more perfect union under the leadership of Prussia; but the time was not yet ripe for such union, and the attempt failed. Still earlier, in 1833, Prussia had led in the formation of a 'Customs Union' (*Zollverein*) between herself and all[1] the states of the Confed-

[1] The Union did not at first include this 'all,' but it did eventually.

eration except Austria, which laid the free-trade basis for those subsequent political arrangements from which also Austria was to be excluded.

In 1850 Prussia received from the hands of her king the forms, at least, of a liberal government, with parliamentary institutions; and these concessions, though at first largely make-believe, served eventually as the basis for more substantial popular liberties.

397. **The North German Confederation** (1867–1871). — Finally, in 1866, came the open breach between Prussia and Austria. The result was a six weeks' war in which Austria was completely defeated and humiliated. The Confederation of 1815 fell to pieces; Prussia drew about her the Protestant states of Northern Germany in a 'North German Confederation'; the middle states, Bavaria, Württemberg, Baden, etc., held off for a while to themselves; and Austria found herself finally excluded from German political arrangements.

398. **Austria out of Germany.** — Since then Austria, originally predominantly German, has devoted herself to the task of amalgamating the various nationalities of Southeast Europe under her hegemony, and so has become in large part a non-German state. Prussia has become the head and front of Germany, in her stead.

Meantime Prussia has grown more than one-fifth in territory. The rearrangement at Vienna in 1815 gave her Swedish Pommerania and the northern half of Saxony; the war of 1866 confirmed her in the possession of Schleswig-Holstein, Hannover, Hesse-Cassel, Hesse-Nassau, and Frankfort.

399. **The German Empire.** — The finishing impulse was given to the new processes of union by the Franco-Prussian War of 1870–1871. Prussia's brilliant successes in that contest, won, as it seemed, in the interest of German patriotism against French insolence, broke the coldness of the middle states towards their great northern neighbor; they joined the rest of Germany; and the German Empire was formed (Palace of Versailles, Jan. 18, 1871).

Government of the Empire.

400. **Austria and Germany: Character of the German Empire.** — When he ceased to be Emperor of the Holy Roman Empire (1806; sec. 381), Francis I. still remained Emperor of Austria. He had assumed that title in 1804; and from that day to this there has been in full form — what there had long been in reality — an Austrian Empire. In 1871 there arose by its side a new German Empire, but the two empires are thoroughly unlike one another. The Austrian Empire, though wearing the form of a dual monarchy as Austria-Hungary, is composed of the hereditary possessions of the House of Habsburg; the German Empire, on the other hand, is a federal state composed of four kingdoms, six grand-duchies, five duchies, seven principalities, three free cities, and the imperial domain of Alsace-Lorraine, these lands being united in a great 'corporation of public law' under the hereditary presidency of the king of Prussia. Its Emperor is its president, not its monarch.

The four kingdoms are Prussia, Bavaria, Württemberg, and Saxony; the grand-duchies, Baden, Mecklenburg-Schwerin, Hesse, Oldenburg, Brunswick, Saxe-Weimar, and Mecklenburg-Strelitz; the duchies, Saxe-Meiningen, Anhalt, Saxe-Coburg, and Saxe-Altenburg; the principalities, Waldeck, Lippe, Schwarzburg-Rudolstadt, Schwarzburg-Sondershausen, Reuss-Schleiz, Schaumburg-Lippe, and Reuss-Greiz; the free cities, Hamburg, Lübeck, and Bremen.

401. **The Central German States and the Empire.** — The first step towards union was taken in 1870, when Baden, Bavaria, and Württemberg, fearing that the object of Napoleon III. was to conquer the central German states or renew the Confederation of the Rhine, had decisively espoused the side of Prussia and the North German Confederation. While the siege of Paris was in progress these three states sent delegates to King William at Versailles and formally united themselves with their northern compatriots: the North German C

eration became the German Confederation, with King William as president. Almost immediately, however, the influences of the time carried the Confederates a step farther: at the suggestion of the king of Bavaria, the president-king was crowned Emperor, and the German Confederation became the German Empire.[1]

402. **The Constitution of the Empire.** — The new Empire, however, bears still, in its constitution, distinctest traces of its derivation. It is still a distinctly federal rather than unitary state, and the Emperor is still only its constitutional president. As Emperor he occupies not an hereditary throne, but only an hereditary office. Sovereignty does not reside in him, but "in the union of German federal princes and the free cities." He is the chief officer of a great political corporation.

403. **The Emperor.** — Still his constitutional prerogatives are of the most eminent kind. Unlike other presidents, he is irresponsible: he cannot be removed, his office belonging inalienably to the throne of Prussia, whether its occupant be king or regent only. He summons, opens, adjourns, and closes the two Houses of the federal legislature, the *Bundesrath* and the *Reichstag*, the latter of which he can also, upon the advice of the *Bundesrath*, dissolve. He appoints, and may at his pleasure remove, the Imperial Chancellor, who is both the vital centre of all imperial administration and chairman of the *Bundesrath;* and he appoints also, under the countersignature of the Chancellor, all minor officers of the imperial service, whom, with a like co-operation of the Chancellor, he may also, of course, dismiss. He controls the foreign affairs of the Empire and commands its vast military forces; and in this latter capacity, of commander-in-chief of the imperial army, it rests with him, acting with the consent of the *Bundesrath*, to coerce into obedience such states of the Empire as may at any time wilfully and pertinaciously neglect to fulfil their

[1] The present constitution of the Empire bears date April 16, 1871.

federal duties. He has, in brief, to the fullest extent, both the executive and the representative functions now characteristic of the head of a powerful constitutional state. There are distinct limits to his power as Emperor, limits which mark and emphasize the federal character of the Empire and make of it a state governed by law, not by prerogative; but these limits nevertheless lie abundantly wide apart. Adding, as he does, to his powers as hereditary president of the Empire his commanding privileges as king of Prussia and, as king of Prussia, the dominant member of the Union, he possesses no slight claim to be regarded as the most powerful ruler of our time. (Compare secs. 319, 321, 326, 595, 604, 611, 625, 626, 627, 668, 678, 706, 1102, 1148, 1149.)

404. **Sovereignty of the Empire in Legislation.**—So complete, so unlike that of a mere confederation is the present union of the German states that the sovereign legislative power of the Empire is theoretically unlimited: 'it can by means of constitutional amendment set aside the bounds placed by the constitution between its sphere and that of the individual states, that is, alter them without the consent of the states; it can also withdraw from the states the powers reserved to them. In a certain sense, therefore, it may be said that the individual states possess their magisterial rights only by sufferance of the Empire, only by virtue of its will.'[1] Amendments of the constitution are not submitted either to the people or to the governments of the states: nor are they passed by any special or peculiar procedure, as in France (secs. 311, 318). They are originated and acted upon as ordinary laws would be. The only limitations put upon their passage are, first, that fourteen negative votes in the *Bundesrath* will defeat a proposed amendment, and, second, that no state can be deprived of any right guaranteed to it by the constitution, without its own consent. But, notwithstanding this great con-

[1] Laband, *Das Staatsrecht des deutschen Reiches* (Marquardsen's *Handbuch*), p. 22.

centration of sovereign powers in the legislative authorities of the Empire, its constitution still retains strongly federal features; and the mirror of those features is the *Bundesrath*.

405. **The Bundesrath; its Composition and Character.** — In form and theory the *Bundesrath* is a body of ambassadors. Its members represent the governments of the states from which they come, and are accredited to the Emperor as diplomatic agents, plenipotentiary *charges d'affairês*, to whom he must extend the same protection that is extended to the like representatives of foreign states. It is a fundamental conception of the German constitution that "the body of German sovereigns together with the senates of the three free cities, considered as a unit, — *tanquam unum corpus*, — is the repository of imperial sovereignty."[1] The *Bundesrath* is the representative of this body, and is therefore the organ through which the sovereignty of the Empire is expressed. The Emperor, consequently, shares the sovereignty of the Empire only as king of Prussia, and takes part in its exercise only through the Prussian members of the *Bundesrath*. It follows, of course, from this principle that the members of the *Bundesrath* are only the agents of their governments, and act under instructions from them, making regular reports of the proceedings of the *Bundesrath* to their home administrations. The votes of a state are valid, whether cast by her representatives in accordance with their instructions or not; but the delegates are responsible for every breach of instructions to their home authorities.

Of course as a matter of practice the delegates to the *Bundesrath* receive only instructions of a very general, unspecific character, or none at all, seeking special instruction only for votes of great importance.

406. **Representation of the States in the Bundesrath.** — The states of the Empire are unequally represented, according to their size. Prussia has seventeen votes; Bavaria six;

[1] Laband, p. 40.

Saxony and Württemberg four each; Baden and Hessee each three; Mecklenburg-Schwerin and Brunswick each two; the other seventeen states one apiece. The votes of each state which is entitled to more than one vote must be cast together as a unit, and each such state can cast her full vote whether or not she have her full number of representatives present.

The significance of the constitutional provision that amendments to the constitution may not pass if there be fourteen negative votes cast in the *Bundesrath* is quite evident. A combination of the small states may defeat any organic change of law proposed by the large states; and Prussia alone can bar any amendment to which she is opposed. The seventeen votes of Prussia on the one side and the seventeen votes of the small states on the other may be said to constitute the central balance of the system.

407. **Functions of the Bundesrath.** — The *Bundesrath* occupies a position in the German system in some respects not unlike that which the Roman Senate held in Rome's government (sec. 149). It is, so to say, the residuary legatee of the constitution; all functions not specifically entrusted to any other constitutional authority remain with it; no power is in principle foreign to its jurisdiction. It has, therefore, a composite character; it is at one and the same time an administrative, a legislative, and a judicial body.

408. In its *legislative* capacity it may be considered the upper house of the legislature. It may originate bills to be sent to the *Reichstag;* and its sanction is indispensable to the validity of all legislation. Its consent must be had also to any treaty which works any change in either the constitutional or statutory law of the Empire (see, also, sec. 409). Members of the *Bundesrath* have, moreover, the right to express their views concerning pending legislation on the floor of the *Reichstag*, even when their views are not those which have been accepted by the majority of the *Bundesrath*.

409. The *administrative* function of the federal chamber may be summed up in the word *oversight*. It considers all

defects or needs which discover themselves in the administrative arrangements of the Empire in the course of the execution of the laws, and may in all cases where that duty has not been otherwise bestowed, formulate the necessary regulations to cure such defects and meet such needs. It has, moreover, a voice in the choice of some of the most important officers of the imperial service. It nominates or elects the members of the Court of Accounts, of the Supreme Court of the Empire (*Reichsgericht*), of the "Chamber of Discipline," as well as the officials who administer the imperial pension funds, and those who constitute the directory of the Imperial Bank. It confirms the nomination, also, either directly or through one of its committees, of consuls and of the officers who exercise the imperial control over the duties and taxes laid by the states under laws of the Empire. It may also be reckoned among the executive functions of the *Bundesrath* that its consent is necessary to a declaration of war (except in case of invasion, when the Emperor may act alone), to a dissolution of the *Reichstag* during a legislative period, and to other like weighty acts of government.

410. The *judicial* functions of the *Bundesrath* spring in part out of its character as the chief administrative council of the Empire. When acting as such a council, many of its conclusions partake of the nature of decisions of a supreme administrative court of appeal. But its jurisdiction as a court is much wider than questions of administration. It can declare a state of the Empire delinquent, and order execution to issue against it. It is the court of highest instance in every case of the denial of justice to an individual in a state court arising out of a defect or deficiency in the law of the state; it being within its competence in such a case to compel the state to cure the deficiency and afford the suitor the proper remedy. It is the court of appeal in all cases of dispute between two or more states of the Empire which involve not mere private law questions (such cases go to the ordinary civil courts), but points of public law.

In case it cannot agree upon a conclusion in such disputes, the whole legislative power is brought into play and a law is passed covering the matter in controversy. If in any case it considers itself unfitted by its organization, or for any other reason, to act as a court in controversies brought before it, it may delegate its judicial powers to a court or to experts.

This it did in 1877 with reference to the dispute between Prussia and Saxony concerning the Berlin-Dresden railway.[1]

411. **Organization of the Bundesrath.** — The Imperial Chancellor is chairman of the *Bundesrath*. He is appointed by the king of Prussia, and he must also be one of Prussia's seventeen representatives, — for it is the better opinion among German constitutional lawyers that the Chancellor's membership in the federal chamber is necessary to his presidency of the body. In case of a tie vote, the Chancellor's vote is decisive: that is to say, *the side on which Prussia's votes are cast prevails*, for her vote must be undivided — the Chancellor's vote is not his own, but is one-seventeenth part of Prussia's whole vote.

The Chancellor may appoint a substitute to act in his absence as president, this limitation resting upon his choice, that if he does not appoint a Prussian delegate to the office he must appoint a Bavarian. He may also appoint a substitute to perform all his functions, and such an appointment would of course include the presidency of the *Bundesrath* unless a separate and special delegation of that office were made, — and unless, also, perhaps, the general substitute were not a member of the federal Council.

412. **Committees.** — The *Bundesrath* follows, of course, the practice of other legislative bodies in referring various matters to special committees of its members. It has, too, like other bodies, certain standing committees. These are three: one on Alsace-Lorraine, one on the Constitution, and one on the Order of Business.

Much more important than these, however, are eight delegations of its members which, though called committees, may be

[1] Laband, p. 48, n.

more properly described as *Commissions*, for like the executive committee of our own Congress under the old Confederation (sec. 867) they continue to sit during the recesses of the chamber which they in a sense represent. Of these Commissions two are appointed by the Emperor, namely a Commission "for the Land Forces and Fortifications" and a Commission "for Naval Affairs": five are chosen yearly by the *Bundesrath*, namely, those "on Tariffs and Taxation," "for Trade and Commerce," "for Railways, Posts, and Telegraphs," "on Justice," and "on Accounts" (*Rechnungswesen*); the eighth and most important, the "Commission on Foreign Affairs," consists of the representatives of Bavaria, Saxony, and Württemberg, and of two other members chosen by the *Bundesrath*. At least five states must be represented on each of these Commissions, and Prussia must always be one of the five, except in the case of the Commission on Foreign Affairs. On this last Prussia needs no representation; she has committed to her, through her king who is also Emperor, the whole conduct of the foreign affairs of the Empire; the Commission is appointed simply to watch the course of international relations, and to inform the several states of the posture of foreign affairs from time to time. "It has to prepare no conclusion for the *Bundesrath* and to make no reports to it: it serves to receive communications concerning the foreign affairs of the Empire and to exchange opinions with the imperial administration concerning" those affairs.[1] Its action is thus independent of its connection with the *Bundesrath;* and this is the chief point of contrast between it and the other Commissions. Their duties are principally to the *Bundesrath:* they for the most part only make reports to it.

Besides their right to representation on the Commission on Foreign Affairs, of which Bavaria has the presidency, Württemberg, Bavaria, and Saxony have also the right to appointments on the Commissions for Land Forces and Fortifications and for Naval Affairs which it is the privilege of the Emperor to name.

[1] Laband, p. 46.

Prussia is entitled to the presidency of all the Commissions except that on Foreign Affairs.

Each state represented has one vote in the action of a Commission, and a simple majority controls.

413. **The Reichstag: its Character and Competence.** — It would lead to very serious misconceptions to regard the *Bundesrath* and the *Reichstag* as simply the two houses of the imperial legislature, unlike each other only in some such way as our Senate and House of Representatives are unlike, only, *i.e.*, because the upper house is differently constituted and is entrusted with a certain share in functions not legislative. Properly conceived, the *Bundesrath* and *Reichstag* stand upon a very different footing with reference to each other. The legislative functions of the *Bundesrath* are only incidental to its character as representative organ of the sovereign body of the Empire, the "body of German sovereigns and the senates of the free cities." It sanctions legislative measures passed by the *Reichstag*, rather than legislates; and legislation is no more peculiarly its business than is the superintendence of administration or the exercise of judicial functions. It, as part of the administration, governs; the *Reichstag*, as representing the German people, controls. The control of the *Reichstag* is exercised, not only through its participation in legislation, but also through the giving or withholding of its sanction to certain ordinances to whose validity the constitution makes its concurrence necessary; through its power of refusing to pass the necessary laws for the execution of treaties of which it does not approve; through its right to inquire into the conduct of affairs; and through its right of remonstrance. Its powers are not enumerated; they are, exercised in one form or another, as wide as the activities of the Empire. The legislative competence of the Empire is, since 1873, legally unlimited as to private law: it covers the whole field of civil and criminal enactment, though as a matter of fact it has been exercised as yet only over a part of that field; much the greater part of

private law has been left to the regulation of the several states.

414. **Composition of the Reichstag.** — The *Reichstag* represents, not the states, or the people of the several states regarded separately, but the whole German people. Representation is distributed on the basis of one representative to every one hundred thousand inhabitants. Representatives are, however, elected by districts, one for each district, and no district may cross a state line and include territory lying in more than one state. If, therefore, any state of the Empire have less than one hundred thousand inhabitants, it may, nevertheless, constitute a district and send a representative to the *Reichstag*.

The *Reichstag* at present (1889) consists of three hundred and ninety-seven members; and of this number Prussia returns two hundred and thirty-six.

415. The members of the *Reichstag* are elected for a term of five years[1] by universal suffrage and secret ballot. The voting age in Germany is twenty-five years; and that is also, of course, the earliest age of eligibility to the *Reichstag*.

The election districts are determined in the northern states according to laws passed under the North German Confederation; in Bavaria, by the Bavarian legislature; in the other southern states, by the *Bundesrath*. The subdivisions of the districts, the voting precincts, are determined by the administrations of the states.

An absolute majority is required for election. In case no candidate receives such a majority, the commissioner of election, — an officer appointed by the administration for each district, — is to order a new election to take place within fourteen days after the official publication of the result of the first, the voting to be for the two candidates who received the highest number of votes. Should this second election result in a tie the lot decides.

416. Election to the *Reichstag* takes place, not on days set by statute, but on days appointed by executive decree, as in

[1] By a law of March 19, 1888, to take effect after the legislative period 1887–'90.

France (sec. 315). For the *Reichstag* may be dissolved by the Emperor, with the consent of the *Bundesrath* (by a vote in which Prussia concurs) before the completion of its regular term of five years.

In case of a dissolution, a new election must be ordered within sixty days, and the *Reichstag* must reassemble within ninety days.

The Emperor may also adjourn the *Reichstag* without its own consent (or, in English phrase, prorogue it) once during any session, for not more than thirty days.

417. **Sessions of the Reichstag.** — The *Reichstag* meets at the call of the Emperor, who must call it together at least once each year; he may convene it oftener. He must summon at the same time the *Bundesrath*. The sessions of the *Reichstag* must be public; it is not within its choice to make them private. A private session is regarded as, legally, only a private conference of the members of the *Reichstag* and can have no public authority whatever.

Members of the *Reichstag* who accept a salaried office under the Empire or one of the states, or an imperial or state office of higher rank or power than any they may have held when elected, must resign and offer themselves for re-election (compare sec. 683).

418. **Organization of the Reichstag.** — The *Reichstag* elects its own President, Vice-presidents (2), and Secretaries. For the facilitation of its business, it divides itself by lot into seven 'Sections' (*Abtheilungen*), every Section being made to contain, as nearly as may be, the same number of members as each of the others. These Sections divide among them the work of verifying the election of members and the choice of special committees. The *Reichstag* has no standing committees; but from time to time, as convenience suggests, temporary committees are named, whose duty it is to prepare information for the body, which they present in reports of a general nature. These committees it is which the Sections select. Each Section contributes its quota of members to each committee.

419. **Course of Legislation.** — One-half of the members constitute a quorum. An absolute majority is requisite for a valid vote.

Every measure passes through three readings. On the first there is a general debate on the question whether the matter shall be referred to a committee or be taken up at once by the body itself (*in plenum*); on the second, the individual clauses of the bill, and amendments to each clause, are considered; on the third, the work of the second reading is debated as a whole (amendments being admitted only if supported by thirty members), votes are taken on the clauses and amendments *seriatim*, and then a vote is had upon the entire measure as completed.

420. **Election of Officers.** — The initial constitution of a newly elected *Reichstag* is interesting. It comes to order under the presidency of the oldest member; it then elects its president, two vice-presidents, and secretaries; the president and vice-presidents for a term of only four weeks. At the end of these four weeks a president and vice-presidents are elected for the rest of the session. There is no election of officers for the whole legislative term, as in England and the United States: at the opening of each annual session a new election takes place. It is only at the first, however, that there is a, so to say, experimental election for a trial term of four weeks.

421. **Imperial Administration.** — While the distinction between the executive and legislative functions of government is sharply enough preserved in Germany, no equally clear discrimination is made in practice between executive and judicial functions. The judiciary is a branch of the administration. The caption 'Imperial Administration' covers, therefore, all activities of the government of the Empire which are not legislative.

Although it is a fundamental principle of the imperial constitution that 'the Empire has sovereign legislative power, the states only autonomy,' the Empire has heretofore occupied only a part of the great field thus opened to it, and has confined itself as a rule to mere oversight, leaving to the states even the execution of most imperial laws.

The judges of all but the supreme imperial court, for instance, the tariff officials and gaugers, the coast officers, and the military authorities, are all state officers.

422. **The Imperial Chancellor.** — The Empire has, of course, however, its own distinct administrative organs, through which it takes, whether through oversight simply or as a direct executive, a most important and quite controlling part in affairs; and the head and centre of its administration is the Imperial Chancellor, an officer who has no counterpart in any other constitutional government.

(1) Looked at from one point of view, the Chancellor may be said to be the Emperor's responsible self. If one could clearly grasp the idea of a responsible constitutional monarch standing beside an irresponsible constitutional monarch from whom his authority was derived, he would have conceived the real, though not the theoretical, character of the Imperial Chancellor of Germany. He is the Emperor's responsible proxy. Appointed by the Emperor and removable at his pleasure, he is still, while he retains his office, virtually supreme head of the state, standing between the Emperor and the *Reichstag*, as the butt of all criticism and the object of all punishment. He is not a responsible minister in the English or French sense (secs. 327, 686, 687); there is, strictly speaking, no 'parliamentary responsibility' in Germany. In many respects, it is true, the Chancellor does occupy with regard to the *Reichstag* much the same position that a French or English ministry holds towards the representatives of the people; he must give an account of the administration to them. But an adverse vote does not unseat him. His 'responsibility' does not consist in a liability to be forced to resign, but consists simply in amenability to the laws. He does not represent the majority in the *Reichstag*, but he must obey the law.

This 'responsibility' of the Chancellor's, so far as it goes, shields, not the Emperor only, but also all other ministers. "The constitution of the Empire knows only a single administrative chief, the Imperial Chancellor."[1]

So all-inclusive is the representative character of the chancellorship

[1] Laband, p. 57.

that all powers not specifically delegated to others rest with the Chancellor. Thus, except when a special envoy is appointed for the purpose, he conducts all negotiations with foreign powers. He is also charged with facilitating the necessary intercourse between the *Bundesrath* and the *Reichstag*.

The Chancellor's relation to the *Reichstag* is typified in his duty of submitting to it the annual budget of the Empire.

423. (2) Still further examined, the chancellorship is found to be the centre, not only, but also the source of all departments of the administration. Theoretically at least the chancellorship *is* the Administration: the various departments now existing are offshoots from it, differentiations within its all-embracing sphere. In the official classification adopted in German commentaries on the public law of the Empire, the Chancellor constitutes a class by himself.[1] There are (1) The Imperial Chancellor, (2) Administrative officials, (3) Independent (*i.e.*, separate) financial officials, and (4) Judicial officials. The Chancellor dominates the entire imperial service.

424. (3) A third aspect of the Chancellor's abounding authority is his superintendency of the administration of the laws of the Empire by the states. With regard to the large number of imperial laws which are given into the hands of the several states to be administered, the Empire may not only command what is to be done, but may also prescribe the way in which it shall be done: and it is the duty of the Chancellor to superintend the states in their performance of such behests. In doing this he does not, however, deal directly with the administrative officials of the states, but with the state governments to whom those officials are responsible. In case of conflict between the Chancellor and the government of a state, the *Bundesrath* decides.

The expenses of this administration of federal laws by the states fall upon the treasuries of the states themselves, not upon the treasury of the Empire. Such outlays on the part of the states constitute

[1] Laband, p. 56.

a part of their contribution to the support of the imperial government.

The states are required to make regular reports to the imperial government concerning their conduct of imperial administration.

425. (4) When acting in the capacity of chairman of the *Bundesrath*, the Chancellor is simply a Prussian, not an imperial official. He represents there, not the Emperor, for the Emperor as Emperor has no place in the *Bundesrath*, but the king of Prussia.

426. **The Vice-Chancellorship.** — The laws of the Empire make a double provision for the appointment of substitutes for the Chancellor. As I have already said, in connection with his presidency of the *Bundesrath* (sec. 411), he may himself appoint a substitute, for whose acts he is, however, responsible. In addition to this a law of 17 March, 1878, empowers the Emperor to appoint a *responsible* Vice-chancellor. This appointment is made, upon the motion of the Chancellor himself, for the administration of all or any part of his duties, when he is himself hindered, even by an overweight of business, from acting; the Chancellor himself judging of the necessity for the appointment. The Chancellor may at any time, too, resume any duties that may have been entrusted to the Vice-chancellor, and himself act as usual. He is thus, in effect, ultimately responsible in every case, — even for the non-exercise of his office. The vice-chancellorship is only a convenience.

427. **Foreign Affairs.** — The full jurisdiction over the foreign affairs of the Empire conferred upon the imperial government by the constitution of the Empire does not exclude the several states from having their own independent dealings with foreign courts: it only confines them in such dealings to matters which concern them without immediately affecting imperial interests. The subject of extradition, for instance, of the furtherance of science and art, of the personal relations and private affairs of dynasties, and all matters which affect the interests of private citizens individually, are left to be arranged, if the states will, independently of the imperial Foreign Office. The states, therefore, have as full a right to send

ambassadors for their own constitutional purposes as the Empire has to send ambassadors for its greater objects affecting the peace and good government of Europe. It may thus often happen that the Empire and several of the states of the Empire are at the same time separately represented at one and the same court. In the absence of special representatives from the states, their separate interests are usually cared for by the representative of the Empire. The department of the imperial administration which has charge of the international relations of the Empire is known as the Foreign Office simply (*das Auswärtige Amt*).

428. **Internal Affairs.** — The general rule of government in Germany, as I have said, is that administration is left for the most part to the states, only a general superintendence being exercised by the imperial authorities. But the legislative sphere of the Empire is very much wider than is the legislative sphere of the central government in any other federal state. Imperial statutes prescribe in very great variety the laws which the states administer, and are constantly extending farther and farther their lines of prescription. From the Empire emanate not only laws which it is of the utmost moment to have uniform, — such as laws of marriage and divorce, — but also laws of settlement, poor laws, laws with reference to insurance, and even veterinary regulations. Its superintendence of the local state administration of imperial laws, moreover, is of a very active and systematic sort.

429. **Weights and Measures.** — Imperial methods of supervision are well illustrated in the matter of weights and measures. The laws with reference to the standard weights and measures to be used in commerce are passed by the imperial legislature and administered by state officials acting under the direction and in the pay of the state authorities; but thorough control of these state officials is exercised from Berlin. There is at the capital a thoroughly organized Weights and Measures Bureau (*Normal-Eichungskommission*), which supplies standard

weights and measures, superintends all the technical business connected with the department, and is in constant and direct association with the state officials concerned, to whom it issues from time to time specific instructions.

430. **Money.** — With regard to money the control of the Empire is, as might be expected, more direct. The states are forbidden to issue paper money, and imperial legislation alone determines money-issue and coinage. But even here the states are the agents of the Empire in administration. Coining is entrusted to state mints, the metal to be coined being distributed equally among them. This, however, is not really state coinage. These state mints are the mere agents of the imperial government: they coin only so much as they are commanded to coin; they operate under the immediate supervision of imperial commissioners; and the costs of their work are paid out of the imperial treasury. They are state mints only in this, that their officers and employees are upon the rolls, not of the imperial, but of the state civil service. The Empire would doubtless have had mints of its own had these not already existed ready to its hand.

431. **Railways.** — The policy of the Empire with reference to the management of the railways is as yet but partially developed. The Empire has so far made comparatively little use of the extensive powers granted it in this field by its constitution. It could virtually control; but it in practice only oversees and advises. The Imperial Railway Office (*Reichs-Eisenbahnamt*) has advisory rather than authoritative functions; its principal supervisory purpose is the keeping of the various roads safe and adequately equipped. The railways are owned in large part by the several states; and the states are bound by the constitution to administer them, not independently or antagonistically, but as parts of a general German system. Here again the Empire has refrained from passing any laws compelling obedience to the constitution on this point; possibly because the states have assiduously complied

of their own accord. Using the *Bundesrath* for informal conference on the matter (though the *Bundesrath* has no constitutional authority in railway administration) they have effected satisfactory co-operative arrangements.

The railways of Bavaria stand upon a special footing: for Bavaria came into the federation on special terms, reserving an independence much greater than the other states retain in the management of her army, her railways, and her posts and telegraphs.

For military purposes, the Empire may command the services of the railways very absolutely. It is as aids to military administration primarily that their proper construction and efficient equipment are insisted on through the Imperial Railway Office. Even the Bavarian railroads may be absolutely controlled when declared by formal imperial legislative action to be of military importance to the Empire. With reference to any but the Bavarian roads a simple resolution of the *Bundesrath* alone suffices for this declaration.

The duty of the states to administer their roads as parts of a single system is held to involve the running of a sufficient number of trains to meet all the necessities of passenger and freight traffic, the running of through coaches, the maintenance of proper connections, the affording of full accommodations, etc.

At times of scarcity or crisis, the Emperor may, with the advice of the *Bundesrath*, prescribe low tariffs, within certain limits, for the transportation of certain kinds of provisions.

432. **Posts and Telegraphs.** — Here the administrative arrangements of the Empire are somewhat complicated. Bavaria and Württemberg retain their own systems and a semi-independence in their administration, just as Bavaria does with regard to her railways also; being subject to only so much of imperial regulation as brings their postal and telegraphic services into a necessary uniformity with those of the Empire at large. In most of the states the imperial authorities directly administer these services; in a few, — Saxony, Saxe-Altenburg, the two Mecklenburgs, Brunswick, and Baden, — there is a sort of partnership between the states and the Empire. The principle throughout is, however, that the Empire controls.

433. **Patents, etc.** — Besides the administrative activities with reference to internal affairs which I have mentioned, the Empire issues patents, grants warrants to sea-captains, naval engineers, steersmen, and pilots; and examines sea-going vessels with a view to testing their seaworthiness.

434. **Military and Naval Affairs.** — The Empire as such has a navy, but no troops. Prussia is the only state of the Empire that ever maintained a naval force, and she has freely resigned to the Empire, which she virtually controls, the exclusive direction of naval affairs. But the case is different, in form at least, with the army. That is composed of contingents raised, equipped, drilled, and, in all but the highest commands, officered by the states. This at least is the constitutional arrangement: the actual arrangement is different. Only Bavaria, Saxony, Württemberg, and Brunswick really maintain separate military administrations. The other states have handed over their military prerogatives to the king of Prussia; and Brunswick also has organized her contingent in close imitation of and subordination to the Prussian army. Bavaria's privileges extend even to the appointment of the commander of her contingent. The Emperor is commander-in-chief, however, appointing all the higher field officers; and the imperial rules as to recruitment, equipment, discipline, and training, of troops, and as to the qualifications and relative grading of officers are of the most minute kind and are imperative with regard to all states alike. The language of the constitution in this connection is: "To the Emperor belongs the uniform regulation and ordering of the army, the supreme command in war and peace, the determination of recruiting needs, and of expense accounts; to the individual states remain command of the contingents, and [military] self-government."

435. **Finance.** — The expenses of the Empire are met partly from imperial revenues, and partly from contributions by the states. The Empire levies no direct taxes; its revenues come principally from customs duties and excises, certain stamp

taxes, the profits of the postal and telegraph system, of imperial railways, of the imperial bank, and like sources. So far as these do not suffice, the states assist, being assessed according to population. And here, again, the states undertake much of the actual work of administration: the customs officials, for example, being state officers acting under imperial supervision. The financial bureaux, like all other branches of the imperial government, are immediately subordinated to the Imperial Chancellor.

436. **Justice.** — In the administration of justice, as in so many other undertakings of government, the Empire superintends, merely, and systematizes. The state courts are also courts of the Empire: imperial law prescribes for them a uniform organization and uniform modes of procedure: and at the head of the system stands the Imperial Court (*Reichsgericht*) at Leipzig, created in 1877 as the supreme court of appeal. The state governments appoint the judges of the state courts and determine the judical districts; but imperial laws fix the qualifications to be required of the judges, as well as the organization that the courts shall have. The decisions of the court at Leipzig give uniformity to the system of law.

437. **Citizenship.** — Every citizen of a state of the Empire is a citizen of the Empire also and may enjoy the rights and immunities of a citizen in every part of the Empire; but citizenship is conferred by the states, not by the Empire. There is no imperial naturalization law; each state admits to citizenship on its own terms. There is in this a reminiscence of the confederate idea, as if there were no federal state (*Bundesstaat*) but only a confederation of states (*Staatenbund*) (compare secs. 915–920). Citizenship of the Empire is only *mediate*, — through a state. The obligations of the citizen to the Empire are none the less strong, however. His duty of allegiance to the imperial government is as direct as his duty to obey the government of his state.

The Government of Prussia.[1]

438. The organization of government in Prussia has, for the student of German political institutions, a double interest and importance. In the first place, Prussia's king is Germany's Emperor, and Prussia is the presiding state of the Empire: many of her executive bureaux are used as administrative agencies of the Empire. Her government is to a certain extent an organ and representative of the imperial government. In the second place, Prussia's administrative system serves as a type of the highest development of local government in Germany. Prussia has studied to be more perfect than any other European state in her administrative organization.

439. **Stages of Administrative Development.** — Until the time when she emerged from the long period of her development as the Mark Brandenburg and took her place among the great military states of Europe, Prussia's administrative organization was of a very crude sort, not much advanced beyond the mediæval pattern. Later, under the Great Elector and his immediate successors, though well out of her early habits, she was still little more than a mere military state, and her administration, though more highly developed, had almost no thought for anything but the army. Only since the close of the Napoleonic wars has her system of government become a model of centralized civil order.

440. **History of Local Government.** — It must of course be remembered that in dealing with *Prussian* local government we are dealing with a complex of historical members. The Prussia of to-day is not Brandenburg merely, but Pommerania, Silesia, Hannover, a score of now compacted provinces which once had their separate existence and their own individual histories. Brandenburg may, however, be made to serve as a norm in the story, inasmuch as she has dominated and the others

[1] The present constitution of Prussia was proclaimed Jan. 31, 1850,

have in great part conformed to her standards and her organization. The royal, centralizing, systematizing forces have worked outwards from her, receiving local modifications, but impressing much of uniformity. The process is even yet incomplete, but its drift is unmistakable and decisively established.

441. **Early Organization in the Mark Brandenburg.** — We have already seen what were the circumstances of the conquest and settlement of the Mark Brandenburg (sec. 383). The German colonists were invited to the Mark by easy conditions of tenure; towns were built upon contract, special privileges being accorded the contractors; and at first the complexities of the feudal system were kept out by the direct relations sustained by the settlers and town-builders to the Markgraf. Under the double system of conquest and settlement there emerged three classes of towns: (1) The original Wendish towns which the conquerors found already established. These became German and were accorded special privileges which gave them a separate standing in the new political order. (2) "Bourgs," or fortresses, around which colonists had clustered, and which, finally losing their military organization and spirit, as the times became peaceful, or wars passed beyond them to the advanced frontiers of the Mark, took on the ordinary features of a civil municipality. (3) Full-grown villages or trading settlements. Many of the towns, of course, fell in spite of themselves into the feudal order, as that fixed itself upon the Mark, and became manorial boroughs; but some kept for a very long time their separateness and semi-independence.

442. **The Early Local Officials.** — The Markgraf and the various princes and greater landlords who presently took their places in the expanding Mark kept their hold upon the towns and the population of the rural districts through the instrumentality of *Schulzen* and *Burggrafen*, officers having substantially the same position and functions as we have seen the French

baillis and *prévots* exercising (sec. 297). The *Schulze* was a rural officer. He was the "intermediary between the peasants and their prince or their landlord," receiving the rents and taxes and acting as chief constable and judge. The *Burggraf*, on the other hand, as his name implies, was a city officer, the direct agent of the Markgraf, presiding in the town as head of the civil and military administration.

443. **Subsequent Development in Town Government.** — This system, however, proved by no means permanent. The *Burggrafen* eventually disappeared. Municipal councils were suffered to assume the chief part in the direction of civil affairs, though the administration of justice was retained in the hands of a city *Schulze*, and the civil authority of the Markgraf was still represented by an officer of consideration, known as the *Vogt*. The *Vogt*, however, though substituted for the *Burggraf* as civil officer of the central government, was not distinctively a city official: his jurisdiction probably included a more or less extensive district of which the town was only the centre.

444. Not only did the towns gain thus much of autonomy; they also obtained representation in the provincial diets, and were permitted to assume control, by purchase, of their feudal contributions to the purse of the Markgraf, under the vicious, but, so far as they were concerned, fortunate system of farming the revenues.

445. **Resulting Units of Local Government.** — The several units of local government thus developed were, cities, royal domains, manors, and rural communes. Such were the materials out of which the afterwards compacted administration of the monarchy was to be put together.

446. **Process of Centralization.** — The Great Elector, as we have seen (sec. 391), reduced the Estates of the Mark to complete subjection to his will. He it was, also, who began the policy by which local affairs as well were to be centralized. In the towns the process was simple enough. The difficulties

of centralization were everywhere measured by the openness or the obstructions of the channels through which the authority of the Elector was to reach the lower local instrumentalities of government. In the towns there was little effective obstruction: the channels were already open. There the military authorities, directly representative of the Elector, had all along dictated in police and kindred matters; direct ordinances of the Elector, moreover, regulated taxation and the finances, and even modified municipal privileges at pleasure. It did not take long, such being the system already established, to make burgomasters creatures of the royal will, or to put effective restrictions upon municipal functions.

447. In the provinces, however, it was quite another matter to crush out local privilege. The Prussia of the Great Elector and his successors was no longer the Mark Brandenburg, but the extended Prussia of conquest. There were many Estates to deal with in the several principalities of the kingdom; and these Estates, exercising long-established prerogatives, very stubbornly contested every step with the central power. *They* were the channels through which the sovereign's will had at first to operate upon provincial government, and they were by no means open channels. They insisted, for a long time with considerable success, that the chief officers of the provinces should be nominated by themselves; and they nominated natives, men of their own number. Only by slow and insidious processes did the Elector, or his successors the kings of Prussia, make out of these representative provincial officials subservient royal servants.

448. **First Results of Centralization.** —The system pursued in these processes of centralization, so far as there was any system in them, was a system of grafting central control upon the old growths of local government derived from the Middle Ages. The result was of course full of complexities and compromises. In the vast royal domains *bailiffs* administered justice and police, as did *Schulzen* in the manorial villages. In

the larger rural areas a *Landrath*, or sheriff, "nominated by the county nobility, usually from among their own number, and appointed by the king," saw to the preservation of order, to the raising of the levies, to tax collection, and to purveyance. In the towns there was a double administration. Magistrates of the towns' own choosing retained certain narrow local powers, constantly subject to be interfered with by the central authority; but royal tax-commissioners, charged with excise and police, were the real rulers. Above this local organization, as an organ of superintendence, there was in each province a 'Chamber for War and Domains,' which supervised alike the *Landrath* and the city tax-commissioners.

A War and Domains Chamber consisted of a president, a "director or vice-president, and a number of councillors proportioned to the size, populousness, or wealth of the province." The president of a chamber was "expected to make periodical tours of inspection throughout the province, as the *Landraths* did throughout their counties." In the despatch of business by a Chamber, the councillors were assigned special districts, special kinds of revenue, or particular public improvements for their superintendence or administration, the whole board supervising, auditing, etc.[1]

449. **Justice and Finance.** — Much progress towards centralization was also made by the organization of justice and finance. "The administration of justice was in the hands of boards, the *Regierungen*, or governments, on the one hand [the whole organization of administration in Prussia being characteristically collegiate], and the courts on the other."

In finance also there was promise of complete systematization. During the period preceding the Napoleonic wars, when Prussia figured as a purely military state, the chief concern of the central government was the maintenance and development of the army. The chief source of revenue was the royal domains: the chief need for revenue arose out of the under-

[1] Tuttle, *History of Prussia*, Vol. III., pp. 107–109.

takings of war.[1] There were, therefore, at the seat of government two specially prominent departments of administration, the one known as the 'General War Commissariat,' and having charge of the army, the other known as the 'General Finance Directory,' and commissioned to get the best possible returns from the domains; and here and there throughout the provinces there were 'War Commissariats' and 'Domains Chambers' which were the local branches of the two great central departments.[2] These two departments and their provincial ramifications were, however, instead of being co-ordinated, kept quite distinct from each other, clashing and interfering in their activities rather than co-operating.

450. **Fusion of Departments of War and Domains.** — Such at least was the system under the Great Elector and his immediate successor, Frederic I., if system that can be called which was without either unity or coherence. Frederic William I. united War and Domains under a single central board, to be known as the 'General Supreme Financial Directory for War and Domains,' and brought the local war and domains boards together in the provinces as Chambers for War and Domains. Under this arrangement the various 'war councillors' who served the provincial Chambers were charged with a miscellany of functions. Besides the duties which they exercised in immediate connection with military administration, they were excise and police commissioners, and exercised in the cities many of the civil functions which had formerly belonged to other direct representatives of the crown. In the rural districts the Chambers were served in civil matters by the several *Landräthe*.

451. **Differentiation of Central Bureaux.** — This arrangement speedily proved as cumbrous as the name of its central organ, and an internal differentiation set in. The General

[1] The army consumed about five-sevenths of the entire revenue.

[2] Seeley, *Life and Times of Stein*, Vol. I., Chap. II. Also Tuttle, Vol. I., pp. 421, 422.

Directory separated into Committees; and, as time went on, these committees began to assume the character of distinct Ministries — though upon a very haphazard system. The work was divided partly upon a territorial basis, there being central bureaux for certain provinces of the state, and partly upon a logical basis, there being central bureaux for certain classes of the public business, irrespective of territorial divisions. Frederic the Great further confused the system by creating special departments immediately dependent upon himself and a special cabinet of advisers having no connection with the General Directory. He was himself the only cohesive element in the administration: it held together because clasped entire within his hand.

452. **Reforms of Stein and Hardenberg.** — Order was at last introduced into the system through the influence of Baron vom Stein and the executive capacity of Count Hardenberg, the two most eminent ministers of Frederic William III., who together may be said to have created the present central administration of Prussia. Prussia owes to the genius of Stein, indeed, the main features of both her central and her local organization. Her central organization is largely the direct work of his hands; and her local organization derives its principles from his thought not only, but also from the provisions of the great Ordinance by which he reconstructed the administration of the towns.

453. Prussian administrative arrangements as they now exist may be said to be in large part *student-made*. As the Roman emperors honored the scientific jurists of the Empire by calling upon them to preside over legal development, so have Prussian kings more and more inclined to rely upon the advice of cultured students of institutions in the organic development of the government. Stein was above all things else a student of governments. In our own day the influence of Professor Gneist upon administrative evolution has continued the excellent tradition of student power. And because she has thus trusted her students, Prussia has had practical students: students whose advice has been conservative and carefully observant of historical conditions.

Of course it is much easier to give such influence to students where the government follows for the most part royal or executive initiative than where all initiative rests with a popular chamber. It is easier to get and to keep the ear of one master than the ears of five hundred.

454. **Reform of Local Government before 1872.** — The county law (*Kreisordnung*) of the 13 December, 1872, has been called the *Magna Charta* of Prussian local government. Upon it all later changes and modifications rest. Between the period of Stein's reforms and the legislation of 1872 the organization of local government was substantially as follows:[1] The provinces were divided into 'Government Districts,' as now, the Government Districts into 'Circles' or Counties. An administrative Board established in the Government District was then, as now, the vital organ of local administration. In the province there was also a board, exercising general supervisory powers, the eye of the central bureaux in the larger affairs of administration, the affairs, that is, extending beyond the area of a single Government District; and, as the chief officer of the province, a 'Superior President' of influential position and function. But alongside of this quite modern machinery stood the old provincial Estates (revived in 1853), representing, not the people, but the social orders of a by-gone age, and possessing certain shadowy powers of giving advice. In the 'Circle' or County, there was still the *Landrath*, as formerly, appointed from a list of local landed proprietors, and associated with the 'Estates of the Circle,' a body composed of the county squires and a few elected representatives from the towns and the rural townships, — a body of antiquated pattern recalled to life, like the Estates of the province, in 1853. In the towns, which had directly received the imprint of Stein's reforming energy and sagacity, administration was conducted by boards of magistrates chosen by popular councils and associated with those councils in all executive business by

[1] See R. B. D. Morier's essay on *Local Government in Germany*, in the volume of *Cobden Club Essays* for 1875.

means of a joint-committee organization, the burgomasters being presidents rather than chief magistrates.

455. **Landgemeinde and Manors.** — Besides these areas of administration there were rural communes (*Landgemeinde*) still connected, quite after the feudal fashion, with adjacent or circumjacent manors, their government vested in a *Schulze* and two or more *Schöffen* (sheriffs or justices), the former being appointed either by the lord of the manor, or, if the village was a free village, as sometimes happened, by the owner of some ancient freehold within the commune with which manorial rights had somehow passed. The commune had, besides, either a primary or an elective assembly. The communes were often allowed, under the supervision of the official board of the Government District, to draw up charters for themselves, embodying their particular local laws and privileges.

Within the manors police powers, poor-relief, the maintenance of roads, etc., rested with the proprietor. Local government was within their borders private government.

456. **Reform of 1872.** — The legislation of 1872 took the final steps towards getting rid of such pieces as remained of the antiquated system. It abolished the hereditary jurisdiction of the manor and the dependent office of *Schulze*, and established in place of the feudal *status* an equal citizenship of residence. In place of the Estates of the province and county it put real representative bodies. It retained the *Landrath*, but somewhat curtailed his powers in the smaller areas within the Circle, and associated with him an effective administrative board, of which he became little more than president. It carried out more thoroughly than before in the various areas the principle of board direction, integrating the lesser with the greater boards, and thus giving to the smaller areas organic connection with the larger. It reformed also the system of local taxation. It is upon this legislation, as I have said, that the system of local government now obtaining in Prussia is erected[1] (secs. 471–493).

[1] Morier, p. 434.

457. **The Central Executive Departments.** — Stein's scheme for the development of the central organs of administration brought into existence five distinct ministries, which no longer masqueraded as committees of a cumbrous General Directory, and whose functions were distributed entirely upon a basis of logical distinction, not at all upon any additional idea of territorial distribution. These were a Ministry of Foreign Affairs, a Ministry of the Interior, a Ministry of Justice, a Ministry of Finance, and a Ministry of War. This, however, proved to be by no means a final differentiation. The Ministry of the Interior was at first given a too miscellaneous collection of functions, and there split off from it in 1817 a Ministry of Ecclesiastical, Educational, and Sanitary Affairs, in 1848 a Ministry of Trade, Commerce, and Public Works and a Ministry of Agriculture. In 1878 a still further differentiation took place. The Ministry of Finance, retaining distinct reminiscences of its origin in the administration of the royal domains, had hitherto maintained a Department for Domains and Forests. That department was in 1878 transferred to the Ministry of Agriculture. At the same time the Ministry of Trade, Commerce, and Public Works was divided into two, a Ministry of Trade and Commerce and a Ministry of Public Works.

There are now, therefore, nine ministries: (1) a Ministry of Foreign Affairs (Stein, 1808); (2) a Ministry of the Interior (1808); (3) a Ministry of Ecclesiastical, Educational, and Sanitary Affairs (1817); (4) a Ministry of Trade and Commerce (1848); (5) a Ministry of Agriculture (1848), Domains, and Forests (1878); (6) a Ministry of Public Works (1878); (7) a Ministry of Justice (1808); (8) a Ministry of Finance (1808); and (9) a Ministry of War (1808).

458. **The Council of State.** — Most of these ministries were created before Prussia had any effective parliamentary system, and when, consequently, there was no instrumentality in existence through which there could be exercised any legislative control of the executive. Stein would have revived for the

exercise of some such function the ancient Council of State (*Staatsrath*) founded by Joachim Friedrich in 1604, which had at first presided over all administration but whose prerogatives of oversight and control had gradually decayed and disappeared. This council, which bears a general family resemblance to the English Privy Council (sec. 672), had a mixed membership made up in part of princes of the blood royal, in part of certain civil, military, and judicial officials serving *ex officio*, and in part of state officials specially and occasionally summoned. It was Stein's purpose to rehabilitate this body, which was in a sense representative of the classes standing nearest to government and, therefore, presumably best qualified to test methods, and to set it to oversee the work of the ministers: to serve as a frame of unity in the administration without withdrawing from the ministers their separate responsibility and freedom of movement. This part of his plan was not, however, carried out, and the Council of State, though still existing, a shadow of its former self, has never fully regained its one-time prominence in administration.

459. Between 1817 and 1848 the Council of State exercised certain important functions: it considered proposed laws and ordinances, passed upon contests as to jurisdiction arising between the several executive departments, heard complaints against decisions of ministries, and fulfilled other uses as a consultative council. Between 1848 and 1852 its meetings were infrequent and only at the king's pleasure, its powers passing into the hands of a committee of its members selected by the king, just as the powers of the English Privy Council passed to the Cabinet (sec. 674). Since 1852 it has been partially, but only partially, recalled to life.

460. **The Staatsministerium.** — Instead of adopting Stein's plan, Count Hardenberg integrated the several ministries by establishing the *Ministry of State*, or College of Ministers (*Staatsministerium*), which stands in much the same relation to Prussian administration that the French Council of Ministers (sec. 325) occupies towards administration in France,

though it in some respects resembles also the French Council of State (sec. 353). It is composed of the heads of the several ministries and meets, once a week or oftener, for the consideration of all matters which concern all the executive departments alike, to discuss proposed general laws or constitutional amendments, to adjust conflicts between departments, to hear reports from the ministers as to their policy in the prosecution of their separate work, to exercise a certain oversight over local administration, to concert measures to meet any civil exigency that may arise, etc. It serves to give unity and coherence to administration.

461. **The Supreme Chamber of Accounts.** — The same purpose is served by the Supreme Chamber of Accounts (*Oberrechnungskammer*) and by the Economic Council (*Volkswirthschaftsrath*). The Supreme Chamber of Accounts was founded in 1714 by Frederic William I. Its members have the tenure and responsibility of judges. Its president is appointed by the crown on the nomination of the Ministry of State; its other members are appointed by the crown upon the nomination of its president, countersigned by the president of the Ministry of State. It constitutes a distinct branch of the government, being subordinate, not to the Ministry of State, but directly responsible to the crown. Its duty is the careful oversight and revision of the accounts of income and expenditure from all departments; the oversight of the state debt and of the acquisition and disposition of property by the state. It watches, in brief, the detailed administration of the finances, and is the judicial guardian of the laws concerning revenue and disbursement.

462. **The Economic Council.** — The Economic Council considers proposals for laws or ordinances affecting weighty economic interests which fall within the domains of the three ministries of Trade and Commerce, of Public Works, and of Agriculture. Such proposals, as well as the proposals for the repeal of such laws and ordinances, are submitted to its debate

before going to the king for his approval. It is also privileged to consider the question how Prussia's votes shall be cast upon such matters in the *Bundesrath*. Of course, however, its part in affairs is merely consultative. It is composed of seventy-five members appointed by the king for a term of five years, forty-five of this number being appointed upon the nomination of various chambers of commerce, mercantile corporations, and agricultural unions.

463. The Ministries of War and of Foreign Affairs are practically, not Prussian, but imperial (sec. 427).

464. **The Ministers in the Legislature.** — The king — or, more properly, the Administration, — is represented in the legislative houses by the ministers, who need not be members in order to attend and speak on the public business.

465. **The Landtag: the House of Lords.** — The Prussian *Landtag*, or Legislature, consists of two houses, a House of Lords (*Herrenhaus*) and a House of Representatives (*Abgeordnetenhaus*). The House of Lords might better be described as a house of classes. It contains not only hereditary members who represent rights of blood, but also life members who represent landed properties and great institutions, and officials who represent the civil hierarchy. There sit in it princes of the blood royal nominated to membership by the king; the heads of the houses of Hohenzollern-Hechingen and Hohenzollern-Sigmaringen and of eighteen houses once sovereign whose domains have been swallowed up by Prussia; certain noblemen appointed by the crown; the four chief officials of the province of Prussia (the Supreme Burggraf, the High Marshal, the Grand Master of the Teutonic Order, and the Chancellor); and a great number of representatives appointed by the king upon the presentation of various bodies: certain evangelical foundations, namely, certain colleges of counts, and of landholders of great and ancient possession, the nine universities, and the forty-three cities which have received the right of

nomination. The king may, besides, issue special summons to sit in the House of Lords to such persons as he thinks worthy. There is no limit placed upon the number of members, — the only restriction concerns age; members must be at least thirty years old.

466. **The House of Representatives**, though in a sense representing every Prussian twenty-five years of age who is not specially disqualified to vote, is not constituted by a direct popular franchise, or even by an equal suffrage. The vote is indirect and is proportioned to taxable property. The country is divided into districts; the qualified voters of each district are divided into three classes in such a way that each class shall represent one-third of the taxable property of the district; each of these classes selects by vote a third of the number of electors to which the district is entitled; and the electors so chosen elect the members of the House of Representatives.

467. **The Electoral System.** — One elector is chosen for every two hundred and fifty inhabitants; the voting is not by the ballot, but is public, and an absolute majority of the electors is required to elect. The total number of members of the House is 432. The term is five years. Any Prussian who is thirty years of age and in full possession of civil rights may be chosen.

468. It need hardly to be remarked that the division of the primary voters into classes according to the amount of taxes they pay gives a preponderance to wealth. The three classes are of course very unequal in numbers. It requires a comparatively small number of rich men to represent one-third of the taxable property in a district; it takes a considerably larger number of the well-to-do to represent another third; and the last third will be represented by the great majority of the inhabitants of the district. For the classes are not constituted with a view to distributing the small tax-payers and equalizing the classes numerically. Those who pay most taxes constitute the first class; those who pay less, the second; those who pay least or none, the third; and it may very well happen that a very small number of persons elects thus a third of the electors.

469. **Equality and Competence of the Houses.** — The consent of both Houses is necessary, of course, to the passage

of a law, and they stand upon a perfect equality as regards also the right of initiative in legislation, — except that all financial measures must originate in the lower house, and that the upper house can pass upon the budget, which must be presented first to the House of Representatives, only as a whole. The Lords cannot amend the budget in part when it comes up to them: they must accept or reject it entire.

470. **The King's Power of Adjournment and Dissolution.** — The king may adjourn the House of Representatives for a period not exceeding thirty days, once during any one session without its consent. He may also dissolve it. When a dissolution is resorted to he must order a new election within sixty days, and the newly elected house must assemble within ninety days. (Compare sec. 315, 319.)

471. **Local Government.** — The organization of local government in Prussia is rendered complex by a mixture of historical and systematic elements: it is compounded of old and new, — of the creations of history and the creations of Stein. For Stein's hand is even more visible in local organization in Prussia than in the organization of the central ministries. More conservative than the Constituent Assembly and Napoleon in France, he did not sweep away the old provinces of Prussia, whose boundaries, like those of the French provinces of the old *régime*, were set deep in historical associations. The twelve provinces were given a place — a function of superintendence — in the new system established. The country was divided into Districts (*Bezirke*) corresponding in general character and purpose with the French Departments; but these Districts were grouped under a superintendent provincial organization. There are, therefore, in Prussian local organization (1) the Province, then (2) the Government District, then (3) the Circle (*Kreis*) or County, and last (4) the township and the town. The township and the town are, as we shall see, co-ordinate, standing, not in subordination to each other, but [illegible] same rank of the series.

472. The usual organs of local government throughout all the series of the Prussian system are "first, a representative body with an exclusive control over the economic portion of the communal business; secondly, an executive board with an exclusive control over the public portion of the communal business; thirdly, mixed committees, composed of members of both bodies, for the ordinary management of the affairs of the community; fourthly, the division of the communal area into administrative districts under overseers responsible to the executive board."[1]

473. **The Province.** — There are in the Province two sets of governmental organs: one of which represents the state and its oversight, the other the Province and its self-government. (1) The state is represented by a Superior President and a *Provinzialrath* associated with him. Stein's purpose in retaining the provincial organization was to secure broad views of administration through officials charged with the oversight of extended areas and so elevated above the near-sightedness of local routine and detail. Nearer to the particulars of local administration than the ministers at Berlin, but not so near as the officials of the Government Districts, the provincial representatives of the state are charged with the care "of all such affairs as concern the entire province or stretch beyond the jurisdiction of a single [district] administration."[2] These are such matters as affect imperial interests or the whole Prussian state; the concerns of public institutions whose functions extend beyond a District; insurance companies; extensive plans of improvement; road and school management, etc. In exercising most of these functions the provincial authorities act, however, not through officers of their own, but through the District Administrations. There lies with the Superior President, also, the duty of overseeing district administration, the provincial tax directors, and the general Commission for the regulation of

[1] R. B. D. Morier, *Cobden Club Essays* (1875) on *Local Government and Taxation*, p. 433.

[2] Schulze, *Das Staatsrecht des Königreichs Preussen* (in Marquardsen's *Handbuch*), p. 63.

the relations between landlords and tenants. He represents the central government, also, in all special, occasional duties, and under all extraordinary circumstances. He has, too, initial jurisdiction in cases of conflict between District Administrations, or between such Administrations and specially commissioned officials not subject to their orders.

The extraordinary powers of the 'Superior President' are illustrated by the fact that, in case of serious civil disturbance, of war or the danger of war, he is authorized to assume the whole authority of administration, local as well as general, within the Province.

In overseeing the District Administration, however, he has no executive, but only advisory powers. He is the eye of the Ministries at Berlin, advising them of all matters needing their action. Like the French Prefect, he is the servant of all Ministries alike, though most directly and intimately associated with the Ministry of the Interior.

474. The defect of the provincial organization in Prussia is said to be lack of vitality. Critics like Professor Gneist think that it renders the system of local government cumbrous without adding to its efficacy. It is too much restricted to gratuitous advice, and too little authorized to take authoritative action.

475. The *Provinzialrath*, the Council associated with the Superior President, consists, besides the President or his representative as presiding officer, of some high administrative official appointed by the Minister of the Interior and of five members chosen by the Provincial Committee for a term of six years.

476. (2) The organs representing the Province and its self-government are the Provincial *Landtag*, the Provincial Committee, and the *Landeshauptmann* or *Landesdirektor*. In a Prussian law concerning local government the province is described as "a communal union established with the rights of a corporation for self-government of its own affairs."[1] The provincial legislative body, the *Landtag*, is composed of representatives elected from the Circles or Counties by the diets of the Circles: for, when looked at from the point of view of self-

[1] Schulze, *Das Staatsrecht des Königreichs Preussen* (in Marquardsen's *Ha* 85.

government, the Province is a union of Circles, not of Districts: the Districts are organs of the central government only. The functions of the *Landtag* lie within the narrow field of such matters as the apportionment of taxes among the Circles (which in their turn apportion them among individuals), the examination of the local budget, the care of provincial property, and the election of certain officials.

It also, on occasion, gives its opinion on bills concerning the Province and on other matters referred to it, for an expression of opinion, by the authorities at Berlin.

477. The *Landtag* elects the Provincial Committee and the *Landeshauptmann*, who are the executive organs of provincial self-government. The *Landeshauptmann* and the Committee stand related to each other very much as do the Superior President and *Provinzialrath*, Prefect and Prefectural Council: the *Landeshauptmann* is the executive, the Committee the consultative organ of local self-administration.

478. The spheres of the representatives of the state and of the representatives of local self-government are quite sharply distinguished in Prussia. The Provincial Committee and the *Landeshauptmann* have nothing to do with the general administration: that is altogether in the hands of the Superior President and the *Provinzialrath*, who on their part have nothing to do with local self-government. The sphere of local self-government, though very narrow indeed, is much more guarded against the constant interference of the central authorities in Prussia than in France. (Compare sec. 346.)

479. **Communal Estates.** — In some Provinces there still exist certain corporations, representing the old organization by 'estates' of independent districts, which retain their '*landtag*,' their separate property, and a small part of their privileges. They constitute rural poor-unions, and play a limited part in local administration according to the sharply explicit laws of incorporation under which they now exist. They are, however, being gradually abolished or transformed by special enactments. Their German name is *Kommunal-standische Verbände*, which may be translated, Unions of Communal Estates.

480. **The Government District** (*Regierungsbezirk*). — Unlike the Province, the Government District has no organs of

self-government: it is exclusively a division of *state* administration. Its functionaries are the principal — it may even be said the universal — agents of the central government in the detailed conduct of administration: they are charged with the local management of all affairs that fall within the sphere of the Ministries of the Interior, of Finance, of Trade and Commerce, of Public Works, of Agriculture, of Ecclesiastical and Educational Affairs, and of War, exclusive, of course, of such matters as are exceptionally entrusted to officers specially commissioned for the purpose. In brief, they serve every ministry except the Ministry of Justice.

481. Collectively the functionaries of the District are called the 'Administration' (*Regierung*), and their action is for the most part collegiate, *i.e.*, through Boards. The exception to this rule concerns matters falling within the province of the Ministry of the Interior. That Ministry acts in the District, not through a board of officials, but through a single official, the President of the Administration (*Regierungspräsident*). In dealing with all other matters the action is collegiate; but the Boards are not independent bodies: they are divisions (*Abtheilungen*) of the 'Administration' taken as a whole, and in certain affairs of general superintendence the 'Administration' acts as a single council (*im Plenum*). Each Board is presided over by a 'Superior Administrative Councillor' (*Oberregierungsrath*); and that on Domains and Forests has associated with it a special functionary known as the Forest-master. The members of the 'Administration' are all appointed by the central government, which places upon the Boards whose functions require for their proper discharge a special training certain so-called "technical members": for instance, school experts, medical experts, road-engineers, and technically instructed forest commissioners.

These 'Administrations' have taken the places of the old-time War and Domains Chambers of which I have spoken (sec. 449), and which, like the Administrations, acted through Boards as a sort of universal

agency for all departments of government. It is only since 1883 that the affairs of the Interior have been given into the sole charge of the President of the Administration. Before that date they also were in the hands of a Board.

482. "Every head of a department, as well as every *Rath* and assessor, is bound each year to make a tour through a portion of the [Government] district, to keep an official journal of all he sees, to be afterwards preserved amongst the records of the Board, and thus to make himself practically acquainted with the daily life and the daily wants of the governed in the smallest details."[1]

483. **The President of the Administration** is the most important official in the Prussian local service. Not only does he preside over the Administration, the general and most important agency of local government; he is also equipped for complete dominance. Shouldering all responsibility, he may annul decisions of the 'Administration' or of any of its Boards with which he does not agree, and, in case delay seems disadvantageous, himself command necessary measures. He may also, if he will, set aside the rule of collegiate action and arrange for the *personal* responsibility of the members of the 'Administration,' whenever he considers any matter too pressing to await the meeting and conclusions of a Board, or, if when he is himself present where action is needed, he regards such an arrangement as necessary.[2] In brief, he is the real governing head of local administration.

484. **The District Committee.** — Although, as I have said, the Government District is not an area of self-government, a certain part in the oversight of government action in the District is given to representatives of the provincial agents of the people. A District Committee (*Bezirksausschuss*), composed of two members (one of whom must be a qualified judge, the other a qualified member of a high grade of the administrative service) appointed by the king for life, and of four members

[1] Morier (*Cobden Club Essays*), p. 422.
[2] Schulze (in Marquardsen), p. 64.

chosen by the Provincial Committee (sec. 477), for a term of six years, is allowed an oversight of 'such affairs of the District as are suitable for lay participation and for collegiate handling.' It is constituted, *i.e.*, a sort of eye of the District in state concerns: for, though indirectly representative of the self-governing body of the Province, the District Committee, like all other District authorities, concerns itself with state administration exclusively. Very much more important than its administrative functions are the judicial functions with which it has been recently invested. Since 1883 the District Committee has been the Administrative Court of the District (sec. 500).

The Government Districts number thirty-five, and are grouped, as I have said, within the twelve Provinces.

485. **The Circle** (*Kreis*). — In the Circle, as in the Province, there emerges a double set of functions: there is the state administration and, alongside of it, the narrower functions of self-government. The Circles are considered 'the chief pillars of state administration and of communal organization.' This double set of functions is performed, however, by a single set of functionaries: by the County Justice (*Landrath*) and the Circle Committee (*Kreisausschuss*) as executive, and the Diet of the Circle (*Kreistag*) as consultative and supervisory, authority. There are not, as in the Province, one council and one executive for the state, another council and another executive for the locality.

486. **The Landrath and the Circle Committee.** — The *Landrath* stands upon a peculiar footing: his office is ancient and retains many of its historical features. Originally the *Landrath* represented the landed gentry of various districts of Brandenburg; he was appointed upon their nomination and in a sense represented their interests. In some parts of Prussia traces of this right of presentation to the office by the landowners still remain; and in almost all parts of the kingdom

the privilege of nomination has been transferred to the Circle Diet, as heir of the control once exercised by the local lords of the soil. The *Landrath* is, therefore, formally, the representative of the locality in which he officiates. In reality, however, he is predominantly the agent of the state, serving both the Administration of the District and the departments at Berlin. He is chief of police within the Circle, and, within the same limits, superintendent of all public affairs. Associated with him in the administration of his office, and organized under his presidency, is the Circle Committee, which consists, besides himself, of six members chosen by the Circle Diet. This Committee also constitutes the Administrative Court of the Circle (sec. 500).

487. **The Diet of the Circle** represents, not the people, but groups of interests, — it is based upon the economical and social relations of the people. Each Circle includes all towns lying within it which have less than 25,000 inhabitants and representation in the Diet is divided between town and country. The country representation, in its turn, is divided between the rural Commune and the greater landowners.

The cities elect representatives either singly or in groups: if singly, through their magistrates and councils acting together; if in groups, through electors who assemble under the presidency of the *Landrath*. As 'greater landowners' are classed all those who pay, in their own right, 75 thalers annual land or building tax; and these are organized for electoral purposes in Unions (*Verbände*). The rural Communes elect in groups through electors. The term of members of the Circle Diet is six years. Cities having more than 25,000 inhabitants constitute separate Circles, and combine in their town governments both Circle and Commune under the forms of city government.

488. **The Magisterial District** (*Amtsbezirk*). — The rural Communes are grouped into some five thousand six hundred and sixty-eight Magisterial Districts, which are presided over by a Reeve (*Amtsvorsteher*), nominated by the [illegible] Diet, and by an associate Magisterial Committee (*

schuss) composed of the chiefs of the Communes and the possessors of certain historically derived independent proprietary districts. These districts serve in their grade as minor units for both state administration and communal self-direction.

489. **The Rural Commune** (*Landgemeinde*). — The organization of the Rural Commune varies widely in the different Provinces, resting in part on ancient local custom and old local laws, and not altogether upon any uniform plan. Commune differs from Commune in points of economical and social condition too important to be overlooked. In some a general assembly of the people acts as the controlling body; in others a representative council. In some the executive officer is known as 'mayor,' in some as 'president,' in some as 'village judge'; in most he is assisted by one or more aids or aldermen, and a great variety of modes of choice to the executive office prevails. The Communes may be said to be in all stages of the approach to complete self-government in local affairs. System has not yet thoroughly penetrated to them.

490. **The City Communes** (*Stadtgemeinde*). — Among the City Communes there is also great variety of organization; but not so great as among the rural Communes. The towns have been brought to a somewhat uniform system by reforms introduced by that great systematizer and vivifier of Prussian administration, Baron vom Stein. In some cities there is a single executive, — a single Burgomaster, — perhaps assisted by certain Boards; in others the Burgomaster has colleagues; in still others the magistracy is collegiate, — is itself a Board. In all there are councils more or less directly representative of the people. In the cities, as in every other unit of local administration, the subjects of finance, police, and the military are exclusively controlled from Berlin; and in these branches of administration the city governments are agencies of the central government. They thus have a double character; they are at one and the same time representatives of the authorities at the capital and of the citizens at home. When acting

as agencies of the state administration they are, of course, responsible to the central Departments.

The qualifications for citizenship vary widely in the different city Communes. In some the possession of landed estate is required, in others the payment of a certain tax, etc.

There is in Prussian local organization none of the extreme, the rather forced uniformity so noticeable in France, where no difference is made between rural Communes and city Communes, only the greater cities, like Paris and Lyons, being given a special organization. In Prussia historical and other grounds of variety have been freely observed.

491. General Principles of Prussian Town Government. — Although without uniformity of structure, town government in Prussia has certain uniformities of principle at its basis which render it a striking example of active self-government. The mayor of a Prussian city is not the Executive; he is simply directing president of the executive. There is associated with him a board of Aldermen most of whose members are elected from the general body of citizens, to serve without salary, but an important minority of whose members are salaried officials who have received a thorough technical training in the various branches of administration, and whose tenure of office is in effect permanent: and this board of Aldermen is the centre of energy and rule in city government. But it acts under check. A town council represents the citizens in the exercise of a control over the city budget and citizens not of the Council as well as Councilmen act with the Aldermen in the direction of executive business. The Aldermen act in Committees in the administration of the city, and associated with their committees are certain delegations of town-councilmen and certain 'select citizens' named by the Council. In the wards of the larger towns the Aldermen command also the assistance of local committees of citizens, by whom the conditions and needs of the various districts of the town are familiarly known. Thus in the work of poor

relief, in the guardianship of destitute orphans, in education, and in tax assessment 'select citizens' commonly reinforce the more regular, the official, corps of city officers. This literal self-government, which breaks down the wall of distinction between the official and the non-official guardian of city interests and presses all into the service of the community, is not optional; it is one of the cardinal principles of the system that service as a 'select citizen' is to be enforced by penalties — by increasing the taxes of those who refuse to serve.

492. Berlin "governs itself through more than ten thousand men belonging to the wealthier part of the middle classes."[1] The citizens chosen for ward work or for consultation with the central committees of Aldermen and town-councillors include merchants, physicians, solicitors, manufacturers, head-masters of public schools, and like representative persons.

493. The three-class system of voting described in secs. 466 and 468 obtains also in all municipal elections in Prussia, so that weight in the electoral control of city affairs is proportioned to tax-assessment. One-third of the elected Aldermen and town-councillors represent the wealthy class, one-third the middle class, one-third the 'proletariat.'

494. **The Administration of Justice.** — The Prussian courts of justice, like those of the other states of the Empire, have the general features of their organization and jurisdiction prescribed by imperial law (sec. 436). They are Prussia's courts; but they also serve as courts of the Empire; Prussian law commands only their *personnel* and their territorial competence. At the head of the system sits the supreme court of the Empire (*Reichsgericht*), to which the courts of all the other states stand subordinated.[2] In each Province there is a Superior District Court (*Oberlandesgericht*), and, next below it, a District Court (*Landgericht*). In each magisterial District there is an *Amtsgericht*.

[1] Professor Gneist, *Contemporary Review*, Vol. 46 (1884), p. 777.

[2] Prussia is vouchsafed by imperial law the privilege of retaining her own supreme court; but she has not availed herself of the permission.

495. The *Amtsgericht*, which is the court of first instance in minor civil cases, consists of one or of several judges, according to the amount of business there is for the court to despatch: for when there is more than one judge, the work is not handled by them together, but separately; it is divided, either logically or territorially.

496. The higher courts, the District Court, that is, and the Superior District Court, consist each of a number of judges. At the beginning of each year, the full bench of judges in each court determine a division of the business of the court among themselves, constituting themselves in separate 'chambers' for separate classes of cases. There is always a 'civil chamber' and a 'criminal chamber,' and often a chamber for commercial cases (*Kammer für Handelssachen*).

Each chamber has its own president and its own independent organization.

497. Minor criminal cases are tried in sheriffs' courts (*Schöffengerichte*) sitting in the Magisterial Districts; more serious offences by the criminal chamber of the District Court; all grave crimes by special jury-courts (*Schwurgerichte*) which sit under the presidency of three judges of the District Court.

An appeal from a sheriff's court on the merits of the case can go no further than the District Court. Appeals on the merits of the case from the criminal chamber of the District Court are not allowed; but a case can be taken from that court on the ground of the neglect of a rule of law to the Superior District Court, and on other legal grounds to the Imperial Court, for revision.

498. The nomination of all judges rests with the king: but the appointment is for life and the judges stand in a position of substantial independence. The Minister of Justice, however, completely controls all criminal prosecutions: for no criminal prosecution can be instituted except by the states-attorneys who represent the government in the several courts, and these hold their offices by no permanent tenure, but only at the pleasure of the Minister.

Purity in the administration of justice is sought to be secured by public oral proceedings. Until a very recent period all proceedings in the Prussian courts were written: the plea and the answer constituted the suit. Now public oral proceedings are made imperative.

499. The organization of justice in Prussia provides for the assumption by the state of a certain 'voluntary' jurisdiction, some of which, such as the exercise of guardianship and the probate of wills (which latter is made a function of the *Amtsgericht*) are quite familiar to the practice of other countries; but others of which, such as an oversight over certain feudal interests, are somewhat novel in their character.

The system knows also certain officially commissioned Arbitrators (*Schiedsmänner*) and certain trade judges, which are in some respects peculiar to itself.

500. **Administrative Courts** (*Verwaltungsgerichte*). — The same distinction between administrative and ordinary courts of justice that we have observed in France obtains also in Prussia (sec. 353). 'Where the use of the state's sovereignty (*Hoheitsrecht*) begins, there begins the competence of the administrative courts.'[1] Here again appears the organizing hand of Stein. He established for Prussia the principle that cases arising out of the exercise of the state's sovereignty should be separated in adjudication from cases between private individuals and be allotted to special courts. Such are cases of damage done to an individual through the act of an administrative officer, or cases of alleged illegal action on the part of a public official, — in brief, all cases of conflict between the public power and private rights.

501. The courts charged with this jurisdiction are, (1) in the Circle, the *Circle Committee* (sec. 486), presided over, as in dealing with other matters, by the *Landrath*, and in the cities which themselves constitute Circles, the *City Committee* (*Stadtausschuss*), consisting of the Burgomaster as president and four members, all of whom must be qualified for judicial or for the higher grades of administrative office, elected by the magistracy of the city, acting collegiately, for a term of six

[1] Schulze, p. 100.

years. (2) In the Government District, the *District Committee* (sec. 484), to whose presidency when sitting in this capacity, the king may appoint, as representative of the President of the Administration, one of its members under the title of Director of the Administrative Court (*Verwaltungsgerichtsdirektor*). (3) The *Superior Administrative Court* in Berlin (*Oberverwaltungsgericht*), whose members are appointed by the king, with the consent of the council of ministers, for life. This court stands upon the same footing of rank with the supreme federal tribunal, the *Reichsgericht*. Its members must be qualified, half of them for high judicial, half for high administrative office. It acts, like the other courts, in divisions or 'senates,' each of which has its separate organization and which come together only for the settlement of certain general questions.

502. **The Court of Conflicts** (*Gerichtshof für Kompetenz-konflikte*). — Between the two jurisdictions, the ordinary or private and the administrative, stands, as in France, a Court of Conflicts. It consists of eleven judges appointed for life (or for the term of their chief office); and of these eleven six must be members of the Superior District Court of Berlin, — must belong, that is, to a court of the ordinary jurisdiction. The other five must be persons eligible to the higher judicial or administrative offices. (Comp. sec. 357.)

503. **The Prussian Courts and Constitutional Questions.** — The Prussian courts have no such power of passing upon the constitutionality of laws as is possessed by the courts of the United States. They cannot go beyond the question whether a law has been passed, or, in administrative cases, an official order issued, in due legal form.

504. "When the Prussian citizen, admitted, in the severe school of self-government, to a share in the magisterial function, shall have gained in political consciousness; when the protection of right within the sphere of public law shall have been more surely secured and extended through an ever wider sphere, then will the Prussian state, not merely through military development, but also through its well-membered (*wohlbegliederte*) and free administrative arrangements, fulfil its national destiny (*deutschen Beruf*), in virtue of which it is bound

(*bestimmt*) to advance, with a strong hand and to a fortunate issue (*glücklich hinauszuführen*) upon the immovable foundations of a truly popular monarchy, the great political and economical tasks of the present." [1]

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[1] Schulze, p. 165.

VIII.

THE GOVERNMENTS OF SWITZERLAND.

505. **Feudalism in Switzerland.** — Until the beginning of the fourteenth century the towns and communes of the country now called Switzerland were all held fast in the meshes of the feudal system. Real vassalage, indeed, such as the low countries of France and Germany knew, had never penetrated to all the valleys of the Alps; many a remote commune had never known anything but a free peasantry; and hardly anywhere near the heart of the great mountains had feudal fealty meant what it meant elsewhere. Still great neighbor lords and monasteries had swept even these mountain lands at least nominally within their overlordships, and most of the Swiss Cantons of to-day represent for the most part various pieces of old feudal domains.

506. **First Movements towards Cantonal Independence.** — In 1309, however, began the process which was to create the Switzerland of our time. In that year the Cantons of Schwyz, Uri, and Unterwalden, lying close about the lake of Lucern, won from the Emperor Henry VII. the recognition of their freedom from all supremacy save that of the Empire itself. They had already, about the middle of the thirteenth century, drawn together into a league which proved the seed of the modern Confederacy. That Confederacy has two distinguishing characteristics. It has brought down to us, through an almost unbroken tradition, the republican institutions of the Middle Ages; and it has by slow processes of cautious federa-

tion, drawn together into a real union communities the most diverse alike in point of race, of language, and of institutions without destroying their individuality.

507. **The Processes of Confederate Growth.** — In its briefest terms the story is this. The Cantons broke from the fatal toils of the feudal system while still in possession of those local liberties which the disintegrateness of that system gave leave to grow wherever courageous men could muster numbers enough to assert their independence; having a common cause against the feudal powers about them, they slowly drew together to each other's support; and, having allied themselves, they went on to show the world how Germans, French, and Italians, if only they respect each other's liberties as they would have their own respected, may by mutual helpfulness and forbearance build up a union at once as stable and as free as political history can show. Several centuries elapsed before the development was complete, for the Confederation, as finally made up, consisted of the two very different elements of strong, and for the most part aristocratic free cities and quiet rural peasant democracies. It was necessarily a long time before even common dangers and common interests brought proud Cantons like Bern, and aristocratic cities like Geneva, into cordial relations with the humble originators of the Confederacy, Schwyz, Uri, and Unterwalden. But circumstances constrained and wisdom prevailed: so that union was at last achieved.

508. **French Interference.** — The year 1513 may be taken as marking the close of the period during which the Confederacy won the place it was always to keep among the powers of Europe. In that year the League was joined by the last of those thirteen German Cantons which were to constitute its central membership, so to say, down to the French Revolution. It was not till 1848, however, that its constitution was put upon its present foundations; and not till 1874 that that constitution received at all points its present shape. In the meantime events of the greatest magnitude gave direction to Swiss

affairs. The great powers had recognized the independence of Switzerland in the Treaty of Westphalia, 1648 (sec. 379). The thirteen original Cantons had received great French cities, like Geneva, to the West, and certain Italian lands to the South either into close alliance or into fixed subjection. The French Revolution had sent French troops into Switzerland, in support of a fruitless attempt to manufacture out of the always stiffly independent Cantons, hitherto only confederates, a compact and centralized "Helvetic Republic," after the new model just set up in unhappy France (1798–1802). Napoleon had intervened (1803–1814) for the purpose of both loosing these artificial bonds and creating a new cement for the League in the shape of a common allegiance to himself. And, in 1815, the pressure of the French power being removed, reaction had come. The irritated Cantons, exasperated by the forms of a government not of their own choosing, had flung apart, to the practice of principles of cantonal sovereignty broader, extremer even than those upon which they had based their Union before 1798. The reaction then, in its turn, of course, brought its own penalties. Troubles had ensued which read very much like those, so familiar to Americans, which forced a strong federal government upon the United States.

509. **The Sonderbund War.** — Religious differences of opinion, however, not political, were in Switzerland the occasion of the strife which was to bring union out of disunion. After the power of Napoleon had been broken, the Congress of Vienna had sought to readjust all the arrangements that he had disturbed, and Swiss affairs had not been overlooked. The Cantons were induced to receive Geneva, Valais, Neuchatel, and the territories hitherto held as dependencies, into full confederate membership, and to agree to a Pact (known as the Pact of 1815) which gave to the League, with its increased membership of twenty-two Cantons, a new basis of union. One of the clauses of that Pact contained a solemn guarantee of the rights and privileges of the monasteries still maintained in the Roman

Catholic Cantons: and upon that guarantee were based the hopes of all parties for peace among the members of the League touching questions of religion. But the guarantee was broken down. The wave of democratic reform swept steadily and resistlessly through Switzerland during the revolutionary period of 1830–1848, and where the Protestant and Roman Catholic parties were nearly equal in popular force threatened not a few of the oldest foundations of the mediæval church. The crisis was first felt in Zürich, where the excesses of a radical party temporarily in control brought about, in 1839, a violent reaction. The next year saw the disturbance transferred to Aargau. There the anti-Catholic party, commanding, during a period of constitutional revision, a narrow popular majority, and exasperated by the violent opposition tactics of the clerical party, forced a vote in favor of the abolition of the eight monasteries of the Canton. The Diet of the Confederation was thereupon asked, of course, by the aggrieved party whether it would permit so flagrant a breach of the Pact of 1815. It was forced by a conflict of interests to a compromise, agreeing to the abolition of four of Aargau's eight monasteries. This was in August, 1843. The next month saw the formation of a separate League (*Sonderbund*) by the seven Roman Catholic cantons, Schwyz, Uri, Unterwalden, Luzern, Freiburg, Valais, and Zug. The deputies of these Cantons were, however, slow in withdrawing from the Diet, and the Diet was reluctant to come to open strife with its recalcitrant members. Four years this league within a league was permitted to continue its obstructive agitation. But at last, in November, 1847, war came — a sharp, decisive contest of only eighteen days' duration, in which the seceded Cantons were overwhelmed and forced back to their allegiance.

510. **The New Constitution.** — Constitutional revision followed immediately. The Pact of 1815 was worn out: a strong and progressive constitution had become a necessity which not even the party of reaction could resist or gainsay. By the Constitution of 1848 there was created, out of the old dis-

cordant Confederation of States (*Staatenbund*) the present federal State (*Bundesstaat*). That Constitution, as modified and extended by the important revision of 1874, is the present Constitution of Switzerland.

511. **Character of the Constitution.** — The federal government thus established has many features which are strikingly like, as well as many which are almost as strikingly unlike, the familiar features of our own national system. It has had, since 1874, a federal Supreme Court, which is in many important fields of jurisdiction the highest tribunal of the land; and it has had ever since 1848 a Legislature consisting, as with us, of two branches, or Houses, the one representative of the people, the other representative of the states of the Confederation. The popular chamber is called the "National Council" (*der Nationalrath*), the federal senate, the "Council of States" (*der Ständerath*). The former represents the people as a whole; the latter, the States as constituent members of the Confederation.

Much of the resemblance of these arrangements to our own is due to conscious imitation. The object of the reformers of 1848 and 1874 was not, however, to Americanize their government, and in most respects it remains distinctively Swiss.

512. **Nationality and State Sovereignty.** — Much as such institutions resemble our own federal forms, the Constitution of Switzerland rests upon formal foundations such as were laid for our Union by the failure of the Articles of Confederation, rather than upon such as were laid by our war between the States, — upon a federal, that is, rather than upon a national conception. The Swiss Constitution does indeed itself speak of the Swiss nation, declaring that "the Swiss Confederacy has adopted the following Constitution with a view to establishing the union (*Bund*) of the Confederates and to maintaining and furthering the unity, the power, and the honor of the Swiss nation": and not even the war between the States put the word *nation* into our Constitution. But the Constitution

of Switzerland also, with little regard for consistency, contains a distinct and emphatic assertion of that principle of divided sovereignty which is so much less familiar to us now than it was before 1861. It declares that "the cantons are sovereign, so far as their sovereignty is not limited by the federal Constitution, and exercise as such all rights which are not conferred upon the federal power"; and its most competent interpreters are constrained to say that such a constitution does not erect a single and compacted state (*Einheitstaat*) of which the Cantons are only administrative divisions; but a federal state, the units of whose membership are themselves states, possessed, within certain limits, of independent and supreme power. The drift both of Switzerland's past history and her present purpose is unquestionably towards complete nationality; but her present Constitution was a compromise between the advocates and the opponents of nationalization; and it does not yet embody a truly national organization or power.

513. **Indefinite Constitutional Grants.** — At the same time, the Swiss Constitution leaves open a larger debatable ground between federal and cantonal powers than that which is left open by our Constitution between the powers of the federal government and the powers of the States. The Constitution of the United States limits the federal power by drawing a tolerably clear line between state and national provinces: it distinctly enumerates the powers which Congress shall exercise as well as those which the States shall not exercise (secs. 889–892). The Swiss Constitution, on the other hand, makes no such careful enumeration. It contents itself with such indefinite grants as these: that the federal legislature shall have power to pass "laws and resolutions concerning those subjects which the Confederacy is commissioned by the federal constitution to act upon"; to control the foreign relations of the Cantons; to guarantee the constitutions and territories of the Cantons; to provide for the internal safety, order, and peace of the country; to adopt any measures "which have the ad-

ministration of the federal Constitution, the guaranteeing of the cantonal constitutions, or the fulfilment of federal duties for their object"; and to effect revisions of the federal Constitution.

This indefiniteness is due, in large part at least, to the fact that the federal Constitution has not yet been put upon a thoroughly logical basis. Though the drift of national sentiment has been strong enough to give the federal government great powers, it has not as yet been strong enough to give it complete powers within its own sphere. Cantonal jealousy has withheld logical roundness from the prerogatives of the central authorities: with the result of leaving their outlines a little vague.

514. **Guarantee of the Cantonal Constitutions.** — The Swiss federal Constitution is more definite in guaranteeing to the Cantons their constitutions than our federal Constitution is in guaranteeing to the States "a republican form of government." The guarantee is made to include the freedom of the people and their legal and constitutional rights; the exercise of those rights under representative democratic forms; and the revision of any cantonal constitution whenever an absolute majority of the citizens of the Canton desire a revision.

The Cantonal Governments.

515. **The Cantonal Constitutions and the Federal Constitution.** — So deeply is Swiss federal organization rooted in cantonal precedents, that an understanding of the government of the Confederation is best gained by studying first, the political institutions of the Cantons. At almost all points the federal government exhibits likeness to the governments of the Cantons, out of whose union it has grown. As our own federal Constitution may be said to generalize and apply colonial habit and experience, so the Swiss Constitution may be said to generalize and apply cantonal habit and experience: though be

our own Constitution and that of Switzerland have profited largely by foreign example also.

In some respects the Swiss Constitution is more conservative, — or, if you will, less advanced — than the Constitution of the United States. Those who have fought for union in Switzerland have had even greater obstacles to overcome than have stood in the way of the advocates of a strong central government in this country. Differences of race, of language, and of religion, as well as stiffly opposing political purposes, have offered a persistent resistance to the strengthening and even the logical development of the prerogatives of the federal power. The Constitution of the Confederation, therefore, bears many marks of compromise. It gives evidence at many points of incomplete nationalization, even of imperfect federalization. Cantonal institutions are, consequently, upon a double ground entitled to be first considered in a study of the governments of Switzerland. Both their self-assertive vitality and their direct influence upon federal organization make them the central subject of Swiss politics.

516. **Position of the Legislative Power.** — The development of political institutions has proceeded in the Swiss cantons rather according to the logic of practical democracy than according to the logic of the schools — the logic of elsewhere accepted political philosophy. The Swiss have not, for one thing, hesitated to ignore in practice all dogmas concerning the separation of legislative, executive, and judicial functions.[1] The leading principle according to which they proceed in all political arrangements is, that in every department of affairs the people must, either immediately or through representatives, exercise a direct, positive, effective control. They do not hesi-

[1] I say 'in practice'; for in theory such distinctions are observed. The constitutions of fully half the Cantons say explicitly that legislative, executive, and judicial functions shall be kept fundamentally distinct; but in the practical arrangements actually made the line of demarcation is by no means sharply drawn.

tate, therefore, to give to their legislative bodies a share both in the administration and in the interpretation of laws; and these bodies are unquestionably the axes of cantonal politics.

517. **A Single House.** — A very great variety of practice marks the organization of government in the Cantons; each Canton has had its own separate history and has, to a certain extent, separately worked out its own political methods; but there is one point of perfect uniformity, — the Legislature of each Canton consists of but a single House. The two Houses of the federal legislature have been made after foreign, not after Swiss, models. In Uri, Unterwalden, Glarus, and Appenzell this single law-making body is the *Landsgemeinde*, the free assembly of all the qualified voters, the *folk-moot;* but in the other Cantons the legislative assembly is representative. Representatives are elected by direct popular vote in all the Cantons, and in almost all by the secret ballot.

Elections are for a term which varies from one year to six in the different Cantons, the rule being a term of from three to four years. The number of representatives bears a proportion to the number of inhabitants which also varies as between Canton and Canton, the average being about one to every 994 inhabitants.[1]

In most of the cantons the legislative body is called the Greater Council (*Grosser Rath*) — the executive body being the Lesser Council. In some it is called the Cantonal Council (*Kantonsrath*); in others, the *Landrath*.

518. **Functions of the Cantonal Legislatures.** — The functions of these councils have the inclusiveness characteristic of Swiss political organization of democracy. Not only are they entrusted with such legislative power as the people are willing to grant away from themselves; they also, as a rule, elect the administrative officers of the Canton, and exercise, after such election, a scrutiny of administrative affairs which penetrates to details and keeps executive action completely within

[1] Orelli, *Das Staatsrecht der schweizerischen Eidgenossenschaft* (*Handbuch*) pp. 100, 101.

their control. It is a recognized principle of cantonal government, indeed, that the executive body — executive power, as we shall see, being vested in a board or commission, not in an individual — is a committee of the representatives of the people, — a committee of the legislative Council.[1] To that council they are responsible, as the selectmen of a New-England town are responsible to the town-meeting (secs. 1003, 1004).

519. **Share of the People in Legislation: Imperative Petition.** — So far has the apparent logic of democracy been carried in Switzerland that the people are given in several ways a direct part in law-making. It may even be said that in some of the Cantons the councils merely formulate the laws, while the people pass them. Swiss law, like that of all other states possessing popular governments, gives to the people a certain right of initiative, in the right of petition — which is generally coupled with a duty on the part of the body petitioned to give to the prayers of all petitioners full and careful consideration. But it also goes much further. In many of the Cantons an additional, an *imperative* initiative by petition is given to the people. Any petition which is supported by a certain number of signatures (the number is usually from five to six thousand) and which demands action upon any matter, must be heeded by the Council; a vote must be taken upon it by the Council, and then it must be submitted to the popular vote, even if the action of the Council upon it has been unfavorable.

It was by such popular initiative that compulsory vaccination was done away with in Zürich, by a decisive vote, against the wishes of the Cantonal Council, in 1883. Of course certain formalities are required for the starting of these, so to say, authoritative petitions, or a certain backing by a portion of the members of the Council. Thus, for instance, it was the law in Uri until the adoption of her new Constitution in May, 1888, that such a petition could be started only if first proposed by seven men belonging to seven different families. The new Constitution provides that petitions proposing changes in the Constitution must bear at least fifty signatures; and that every voter may propose acts for the *Landsgemeinde*.

[1] Orelli, p. 99.

320. **The Popular Veto.**—In some of the smaller cantons, again, the people are given a right of Veto. It is provided that, within a certain length of time after the publication of a measure passed by the Council (generally about a month) a popular vote upon the measure may be forced by the petition of some fifty citizens (the number varies of course in different Cantons) and the measure be made to stand or fall according to the decision of that vote.

321. **The Referendum.**—The Veto, however, may be said to have given way to the *Referendum*. In every Canton of the Confederation, except Freiburg only, the right of the people to have all important legislation referred to them for confirmation or rejection has now been, in one form or another, established by law.[1] In the smaller Cantons, which have had, time out of mind, the directest forms of democracy, this legislation by the people is no new thing; they have always had their *Landsgemeinden*, their assemblies of the whole people, and the legislative function of their Councils has long been only the duty of preparing laws for the consideration of the people; just as the *pre-boulentic* Senate in Athens prepared legislation for the people voting in the Assembly (sec. 76). At stated intervals every year, all acts of importance are submitted to the popular vote, a vote which is taken in the little Cantons, like Uri and Unterwalden, in the Assembly, and in the other purely democratic Cantons which have no popular Assembly, by the ordinary processes of polling. Among the Cantons which have representative institutions, on the other hand, the *Referendum* is merely 'facultative'; that is, laws are not submitted to the people, as of course, but only upon the demand, through petition, of a certain large number of voters, as in the case of the 'Veto.' The 'obligatory,' or invariable *Referendum* is, of course, simply popular legislation; the 'facultative' *Referen-*

[1] In Valais, however, the *Referendum* applies only to certain votes upon financial measures.

dum may be described as a popular oversight of legislation: it is the right of appeal from the Council to the people.

522. **History of the Referendum.** — The term *Referendum* is as old as the sixteenth century, and contains a reminiscence of the strictly federal beginnings of government in two of the present Cantons of the Confederation, Graubünden, namely, and Valais. These Cantons were not at that time members of the Confederation, but merely districts allied with it (*zugewandte Orte*). Within themselves they constituted very loose confederacies of communes (in Graubünden three, in Valais twelve). The delegates whom the communes sent to the federal assembly of the district had to report every question of importance to their constituents and crave instruction as to how they should vote upon it. This was the original *Referendum*. It had a partial counterpart in the constitution of the Confederation down to the formation of the present forms of government in 1848. Before that date the members of the central council of the Confederation acted always under instructions from their respective Cantons, and upon questions not covered by their instructions it was their duty to seek special direction from their home governments. The *Referendum* as now adopted by almost all the Cantons bears the radically changed character of legislation by the people. Only its name now gives testimony as to its origin.[1]

523. **The Executive Power** is collegiate in all the Cantons, is exercised, that is, not by a single individual or by several individuals acting independently of each other, but by a commission. This Commission is variously called in the different Cantons. In some it is known as the "*Landamman* and Council," in others as the "Estates-Commission" (*Standeskommission*), in some as the "Smaller Council," but in most as the "Administrative Council" (*Regierungsrath*). Its term of office varies in the different Cantons from one to six years, but the custom is re-election, so that the brief tenure does not in practice result in too frequent changes in executive *personnel*. The members of the executive have always in the mountain Cantons been chosen by the people themselves; in the others they were formerly elected always by the legislative council —

[1] Orelli, p. 104.

whence the name, in some cantons, of "smaller council." Now direct election by the people has been almost universally adopted. Still the Administrative Council remains, in function, a committee of the Legislative Council, being responsible to it for its acts, and taking an active part in the preparation and consideration of legislative measures. It has proved necessary for the Administrative Council to give over trying to act in all matters as a Board and to divide its work among Departments having a general resemblance to ministries. But these Departments are, strictly speaking, only committees, and the Council has usually a very real coherence.

The presiding officer of an Administrative Council is generally known either as *Landammann* or as *Regierungspräsident*.

524. **Local Government: the Districts.** — Local government in the Cantons exhibits a twofold division, into Districts and Communes. The District is an area of state administration, the Commune an area of local self-government. The executive functions of the District, the superintendency of police, namely, and the carrying into effect of the cantonal laws, are entrusted, as a rule, not to a board, but to a single officer, — a *Bezirksammann* or *Regierungs-Statthalter*, — who is either elected by popular vote in the District or appointed by one of the central cantonal councils, the legislative or the administrative. Associated with this officer, there is in some Cantons a District or county Council chosen by vote of the people.

525. **The Gemeinde,** or Commune, enjoys in Switzerland a degree of freedom in self-direction which is possessed by similar local organs of government hardly anywhere else in Europe. It owns land as a separate corporation, has charge of the police of its area, of the relief of the poor, and of the administration of the schools, and acts in the direction of communal affairs through a primary assembly which strongly reminds one of the New-England town-meeting (sec. 1003). Besides its activities as an organ of self-government in the

direction of local affairs, it serves, however, also as an organ of the state administration, as a subdivision of the District; and in such functions it is subject to the jurisdiction of the District *Statthalter*.

Citizenship in Switzerland is naturally associated very closely with the Commune, — the immediate home-government of the citizen, — the primary and most vital organ of his self-direction in public affairs. The Commune is, so to say, the central political family in Switzerland; it is to it that the primary duties of the citizen are owed.

526. In the Commune, as in the Canton itself, the executive power is exercised by a Board, a communal or municipal council. Legislative and consultative power rests, in all but the Romance Cantons, with a general assembly of the people (*Gemeindeversammlung*). In the Romance Cantons the people delegate their functions, by election, to a large Committee or General Council. In all the Cantons alike the executive body — the communal or municipal council — is elected by the people or their representatives, the Committee of the Romance Cantons. The president of the executive council (who is also sometimes called *Hauptmann*, sometimes *Syndic*) often exercises some functions separately from the Council; but, as a rule, all executive action is collegiate.

As an area of general state administration the *Commune* serves as an electoral district, as a voting district for the *Referendum*, etc.

The Federal Government.

527. **The Federal Executive.** — In no feature of the federal organization is the influence of cantonal example more evident than in the collegiate character of the Executive. The executive power of the Confederation, like the executive power of each Canton, is vested not in a single person, as under monarchical or presidential government, but in a board of persons. Nor does Swiss jealousy of a too concentrated executive author-

ity satisfy itself with thus putting that authority 'in commission': it also limits it by giving to the legislative branch of the government, both in the Cantons and in the federal system, an authority of correction as regards executive acts such as no other country has known. The share of the legislative branch in administrative affairs is smaller, indeed, under the federal Constitution than under the laws of the Cantons; but it is large even in the federal system, and it has required a long fight between the friends and the opponents of effective central government to bring the federal executive to even its present degree of independence and efficiency.

528. The executive commission of the Confederation is known as the Federal Council (*Bundesrath*). It consists of seven members elected for a term of three years by the two houses of the federal legislature acting together in joint session as a Federal Assembly (*Bundesversammlung*). The Constitution forbids the choice of two of the seven from one and the same Canton: they must represent seven of the twenty-two Cantons. The Council organizes under a President and Vice-President chosen by the Federal Assembly from among the seven councillors, to serve for a term of one year, the Constitution insisting upon the extreme democratic doctrine of rotation. Neither President nor Vice-President can fill the same office for two consecutive terms; nor can the President be immediately nominated to the office of Vice-President again upon the expiration of his term. There is nothing to prevent the Vice-President succeeding the President, however; and it has hitherto been the uniform practice to follow this natural and proper line of promotion.

The Federal Assembly may elect to the Council any Swiss citizen who is eligible to either Chamber of the Legislature. It may even choose members of the Chambers, though an election to a place in the executive body necessitates a resignation of the legislative function.

529. The choice of the Federal Assembly in constituting the executive has hitherto been admirably conservative. Some of the more prominent members of the Council have been retained upon it by repeat-

re-election for fifteen or sixteen years. Only twice, indeed, since 1848, have members who wished re-election been refused it.[1]

530. The Federal Assembly of course fills all vacancies in the membership of the Council.

531. The three-years term of the Council is coincident with the three-years term of the National Council, the popular branch of the Legislature. At the beginning of each triennial term of this lower House, the two Houses come together as a Federal Assembly and elect the Federal Council.

532. The precedence of the President of the Council is a merely formal precedence: he is in no sense the Chief Executive. He represents the Council in receiving the representatives of foreign powers; he enjoys a somewhat enhanced dignity, being addressed in diplomatic intercourse as 'His Excellency'; and he receives a little larger salary than his colleagues receive.

533. **The Executive and the Legislature.** — The members of the Federal Council, though they may not be at the same time members of either House of the Legislature, may attend the sessions of either House, may freely take part in debate, and may introduce proposals concerning subjects under consideration: may exercise most of the privileges of membership, except the right to make new motions and the right to vote. They thus to a certain extent occupy a position resembling that which a French or English ministry occupy; but there is this all-important difference: the English or French ministers are subject to 'parliamentary responsibility,' — must resign, that is, whenever any important measure which they favor is defeated; whereas the Swiss ministers are subject to no such responsibility. Defeat in the Legislature does not at all affect their tenure. They hold office for a term of years, not for a term of legislative success.

There have been two cases since the establishment of the Council in 1848, — two cases, that is, in forty years, — of resignation from the Council on the ground of disagreement in political opinion, — but two only.[2]

[1] *Westminster Review*, Vol. 129, p. 207. [2] *Ibid.*

534. **The Executive Departments.** — The Council acts as a body of Ministers. It was the purpose of the Constitution that all executive business should be handled by the Council as a whole, but of course such collegiate action has proved practically impossible: it has been necessary to divide the work among seven Departments. Each member of the Council presides over a Department, conducting it much as an ordinary minister would under a Cabinet system, though there is a somewhat closer union of the several Departments than characterizes other systems, and a greater degree of control by the ministers over such details of administration as the 'permanent' subordinates of Cabinet ministers generally manage, by virtue of possession, to keep in their own hands, to the restraint and government of transient political chiefs. All important decisions emanate from the Council as a whole; and, so far as is practicable, the collegiate action contemplated by the Constitution is adopted.

The seven Departments, as organized by a law taking effect Jan. 1, 1888, are (1) of Foreign Affairs, (2) of Justice and Police, (3) of the Interior, (4) of War, (5) of Finance and Imposts, (6) of Industry and Agriculture, and (7) of Posts and Railways. The department of Foreign Affairs is now separated from the presidency, with which it was formerly always associated, so that greater continuity of policy is now possible in all departments.[1]

The arrangement of administrative business in Departments is effected in Switzerland, not as in France and Germany, by executive decree, but by legislative enactment, as in the United States.

535. It is considered the capital defect of this collegiate organization of the Swiss executive, combined as it is with the somewhat antagonistic arrangement of a division of executive business among departments, that it compels the members of the Council to exercise at one and the same time two largely inconsistent functions. They are real, not simply nominal, heads of departments in Swiss practice, and are obliged as such to give their time and attention to the routine, the detail, and the technical niceties of administration; and yet as a body they are expected to impart to the administration as a whole that uniformity, breadth, a

[1] See Hiltz, *Politisches Jahrbuch der Schweiz*, 1887, p. 778.

flexibility of policy that can be imparted only by those who stand aloof from detail and routine and command the wider views of general expediency. They are called to be both technical officials and political guides. It has been suggested by thoughtful Swiss publicists that it would be vastly better to give the departments permanent heads and leave to a board of ministers such as the present Council only a general oversight. Political and administrative functions require different aptitudes, must be approached from very different points of view, and ought never to be united in the same persons.[1]

536. **Mixed Functions of the Executive.** — Swiss law, as I have said, makes no very careful distinctions between executive, legislative, and judicial functions. Popular jealousy of executive power has resulted, alike in the cantonal systems and in the system of the Confederation, in the vesting of many executive functions either wholly or in part in the law-making bodies; and a very singular confusion between executive and judicial functions has issued in the possession by both the executive and the legislative bodies of prerogatives which should, on any strict classification, belong only to regularly constituted courts of law. It is, consequently, somewhat difficult to get a clear summary view of the rôle played in Swiss federal affairs by the central executive Council. Its duties give it a touch both of legislative and of judicial quality.

537. (1) It stands closely connected with the Legislature because of its part in shaping legislation. The Council both originates in the Houses proposals with reference to pending questions and gives its opinion upon proposals referred to it, either by the Houses or by the Cantons. In connection with annual reports to the Houses concerning its conduct of administration and the condition of the Confederation, it urges upon them necessary measures of reform or amelioration. It presents the budget of the Confederation also to the Houses and leads in its debates of financial legislation. It is, in brief, the

[1] Orelli, *Das Staatsrecht der Schweizerischen Eidgenossenschaft* (*Handbuch*), p. 36.

intimate servant and in part the authoritative guide of the Legislature.

538. (2) In the exercise of several of its most important duties the action of the Council is essentially judicial. It is empowered to examine the agreements made by Cantons among themselves or with foreign governments and to judge of their conformity with federal constitutional law, withholding its approval at its discretion. In like manner there are other cantonal laws and ordinances whose validity is made dependent upon its approval; and to a very limited extent, a jurisdiction like that entrusted to the Federal Court in hearing complaints concerning breaches of federal law is given it.

Here are some of the topics touching which the authoritative opinion of the Council may be taken: Cantonal school affairs; freedom of trade and commerce, and the interpretation of contracts with foreign states which concern trade and customs-levies, patent rights, rights of settlement, freedom from military service, free passage, etc.; rights of settlement within the Cantons; freedom of belief; validity of cantonal elections, votes, etc.; gratuitous equipment of the militia.[1]

539. (3) Its strictly executive functions are, however, of course its most prominent and important functions. It appoints all officers whose selection is not otherwise specially provided for by law; it of course directs the whole executive action of the government, overseeing all federal officials, controlling federal finance, and caring for all federal interests; equally of course, it manages the foreign affairs of the Confederation. Besides these usual executive and administrative functions, it exercises, however, others less common. It is the instrument of the Constitution in making good to the Cantons the federal guarantee of their constitutions. It executes the judgments of the Federal Court, and also all agreements or decisions of arbitrators concerning matters in dispute between Cantons.[2] In cases of necessity it may call out and itself direct

[1] Orelli, pp. 43, 44. [2] *Ibid.*, p. 34.

the movements of such cantonal troops as are necessary to meet any sudden danger, provided the Legislature is not in session to command such measures, and provided the call is for not more than two thousand men or for a service of more than three weeks. If more men or longer service seem necessary, the Legislature must be called at once and its sanction obtained. This power of the Council to call out troops to meet a pressing peril of war or riotous disorder is a logical part of the general duty which is imposed upon it of guarding both the external and the internal safety and order of the Confederation, a duty which embraces the general police function of keeping the peace.

540. **The Army.** — The Confederation can maintain no standing army; only the Cantons can maintain troops in time of peace; and even they cannot keep more than three hundred men apiece without the consent of the Confederation.

541. **Preservation of Internal Order.** — The rule that it is the province, not of the Cantons, but of the federal government to preserve the internal order as well as secure the external safety of the Confederation is very absolutely held. The Cantons may not even suppress disorder themselves; they must call upon the federal authorities, who must intervene. If the case be urgent, a Canton may call in the help of a neighbor Canton. If the cantonal authorities most immediately concerned cannot act at all, the federal authorities must themselves take the initiative. There would seem to be no case contemplated in which a Canton might take the responsibility of acting alone and for itself. There must be some form of inter-cantonal co-operation: more than one Canton must agree to the propriety of employing force.

542. **Extradition.** — The most common subject of those agreements between Cantons which it is the duty of the federal authorities to enforce is Extradition. But such conventions do not either in Switzerland or in Germany (where Swiss example in this matter is followed) include either political or press offences among the extraditable crimes.

543. **Appeal in Judicial Cases.** — Following the example of the cantonal constitutions, which provide for a very absolute dependence of the executive upon the representatives of the people and freely neglect, in practice, the careful differen-

tiation of legislative from administrative functions, the federal Constitution of 1848 allowed an appeal in all cases from the Federal Council to the Federal Assembly (*Bundesversammlung*).[1] The constitutional revision of 1874, which had as one of its chief objects the development and strengthening of the judiciary of the Confederation, transferred such appeals to a Federal Court, but did not at all restrict the right of appeal. It transformed the confusion hitherto existing between legislative and executive functions into a new confusion of executive with judicial functions. Nor was the legislative branch even then entirely excluded from judicial action. It was provided that the Federal Court should hear appeals from the Federal Council, but it was also arranged that certain 'administrative' cases might be reserved to the Assembly by special legislative action. Religious and 'confessional' questions have, accordingly, been retained by the Legislature — questions which would seem to be as far as possible removed from the character of administrative matters.

544. It seems to have been the conscious purpose of the more advanced reformers in 1874, to bring the Federal Court as near as possible in character and functions to the Supreme Court of the United States; but they were able to realize their purpose only in part. The most important prerogative of our own Court, its powers, namely, of constitutional interpretation, was denied the Federal Court in Switzerland. Most constitutional questions are decided by the Legislature, except when specially delegated to the Court by legislation. The chief questions of this nature now taken cognizance of by the Court are disputes as to constitutional rights between cantonal and federal authorities.

545. **The Federal Chancellor.** — The office of Federal Chancellor is an inheritance of the present from the older Confederation, in whose days of incomplete federalization the Chan-

[1] There was a decided disposition on the part of the constitution-makers of 1848, in Switzerland, because of a prevalent dread of creating too strong a central executive, to [illegible] executive even beyond Cantonal precedent.

cellor typified the unity of the Cantons. The Chancellor is elected by the Federal Assembly at the same time and for the same term (three years) as the Federal Council. He acts as Secretary of the National Council (*Nationalrath*), is keeper of all the federal records, and exercises a semi-executive function as preserver of diplomatic forms and usages. There is also a Vice-Chancellor who serves as Secretary of the Council of States (*Ständerath*).

546. **The Federal Legislature.** — Properly speaking the legislative powers of the Confederation are vested in the Federal Assembly; but that Assembly consists of two distinct Houses, the National Council and the Council of States, and these two Houses act separately in all strictly legislative matters, coming together as a single Assembly only for the exercise of certain electoral and judicial functions. The two Houses stand in all respects upon an equal footing as regards all subjects of legislation, and divide the work of each session, — that is the originating of measures with regard to the questions to come before them, — by a conference of their Presidents at the beginning of the session. Sessions of the Houses are required by the Constitution to be held annually: as a matter of practice they are held oftener. There are usually two sessions of considerable length every year, one beginning in June, the other in December; and extra sessions are resorted to whenever the state of the public business requires. Such special sessions may be called either by resolution of the Federal Council or upon the demand of five cantons or of one-fourth of the members of the National Council. An absolute majority of its members constitutes a *quorum* in each House.

547. **Composition of the Houses: I. The National Council.** — The popular chamber of the Assembly consists of one hundred and forty-five members chosen from forty-nine federal electoral districts (*Wahl-Kreise*) in the proportion of one representative for every 20,000 inhabitants. The federal electoral districts cannot, however, cross cantonal boundary lines and

include territory in more than one Canton. If, therefore, in the apportionment of representatives among the Cantons, the division of the number of inhabitants of any Canton by the number 20,000 shows a balance of 10,000, or more, that balance counts as 20,000, and entitles to an additional representative. Reappointments are made from time to time to meet changes in the number of inhabitants as shown by decennial censuses. If any Canton have less than 20,000 inhabitants, it is, nevertheless, entitled to a representative.

This is the case with the three so-called half-cantons, Obwalden, Nidwalden, and Inner Appenzell. The other Cantons which have only one representative are Uri, with 23,744 inhabitants, and Zug, with 22,829. Bern, on the other hand, which has 530,411 inhabitants, has twenty-seven representatives, and Zürich, with 316,074, sixteen, while one other, Vaud, has twelve, and two, St. Gallen and Graubünden, have ten each.

548. In those electoral districts which send more than one representative — as for instance, in Bern, whose twenty-seven members are sent from six districts, — candidates are voted for upon a general ticket, each voter being entitled to vote for as many representatives as the district returns (sec. 315).

549. Every Swiss twenty years of age who is not a clergyman and who is qualified to vote by the law of his Canton may vote for members of the National Council. The term of the National Council is three years. Elections take place always in October, on the same day throughout the country — and that day is always a Sunday.

550. It is upon the assembling of each new National Council that the election of the Federal Council takes place (secs. 528–531). The three-years term of the executive Council is thus made to extend from the beginning of the first session of one National Council to the beginning of the first session of the next.

551. The National Council elects its own officers; but in selecting its President and Vice-President it is bound by a rule similar to that which limits the choice of the Federal Council in its yearly election of a presiding o[illegible] No one who has been President during a regular sessio[illegible]nt or Vice-President during the session

next following; nor can any one be Vice-President twice in succession. For the officers of the National Assembly, like the officers of most European law-making bodies, are elected every session instead of for the whole term of the body, as in our House of Representatives and the English House of Commons.

552. **II. The Council of States** (*Ständerath*) **is composed of** forty-four members: **two from each of the twenty-two Cantons.** It would thus seem to resemble very closely in its composition our own federal Senate and to represent distinctively the federal feature of the union between the Cantons. In fact, however, it has no such clearly defined character: for the mode in which its members shall be elected, the qualifications which they shall possess, the length of time which they shall serve, the salary which they shall receive, and the relations they shall bear to those whom they represent, in brief, every element of their character as representatives, is left to the determination of the Cantons themselves, and the greatest variety of provisions consequently prevails. From some Cantons the members are sent for one year only; by some for three; by others for two. In the Cantons which have the obligatory *referendum* they are elected by popular vote, as the members of the National Council are; in those which have representative institutions they are elected by the legislative body of the Canton. Differing, thus, from the National Council, as regards at least very many of its members, only in the fact that every Canton sends the same number as each of the others and chooses the term for which it shall elect, the Council of States can hardly be called the federal chamber: neither is it merely a second chamber. Its position is anomalous and obviously transitional.

553. The Council of States elects its own President and Vice-President, but under the restriction that neither President nor Vice-President can be chosen at any session from the Canton from which the President for the immediately preceding session was taken, and that the office of Vice-President cannot be filled during two successive regular sessions by a member from the same Canton.

554. The Cantons, upon enumeration, number, not twenty-two, but twenty-five, because three of them have been divided into 'half-cantons,' namely, Unterwalden, Basel, and Appenzell. The half-cantons send each one member to the Council of States. The following is a list of the Cantons: Zürich, Bern, Luzern, Uri, Schwyz, Obwalden, Nidwalden, Glarus, Zug, Freiburg, Solothurn, Baselstadt, Baselland, Schaffhausen, Outer Appenzell, Inner Appenzell, St. Gallen, Graubünden, Aargau, Thurgau, Ticino, Vaud, Valais, Neuchâtel, Geneva.

555. **Functions of the Houses.** — It may be said, in general terms, that its Legislature is the supreme, the directing organ of the Confederation. It is difficult, therefore, to classify the functions which the Houses exercise, because they extend into every field of government; but the following may serve as a distinct arrangement of them: 1. They exercise the sovereignty of the Confederation in its dealings with foreign states, controlling all alliances or treaties with foreign powers, determining questions of peace and war, passing all enactments concerning the federal army, and taking the necessary measures for maintaining the neutrality and external safety of Switzerland. 2. They maintain the authority of the Confederation as against the Cantons, taking care to pass all the measures necessary for preserving internal safety and order and for fulfilling the federal guarantee of the cantonal constitutions, and deciding, upon appeal from the Federal Council, the validity of agreements between the Cantons or between a Canton and a foreign power. 3. They exercise the general legislative powers of the Confederation, providing for the carrying out of the federal Constitution and for the fulfilment of all federal obligations. 4. They pass upon the federal budget and control the federal finances. 5. They organize the federal service, providing for the creation of all necessary departments or offices and for the appointment and pay of all federal officers. 6. They oversee federal administrative and judicial action, hearing and acting upon complaints against the decisions of the Federal Council in contested administrative cases.

7. With the concurrence of the people, they revise the federal Constitution.

556. **Revision of the Constitution.** — When the two Houses can agree concerning a revision of the Constitution, it is effected by the ordinary processes, under the ordinary rules, of legislation, though it is followed by an obligatory *Referendum* to the people. But a revision may also be otherwise accomplished. If one House demands particular changes and the other House refuses to assent, or if 50,000 qualified voters call for a revision by petition, the question whether or not a revision shall be undertaken must be submitted to popular vote; and if there be a majority of the whole of such popular vote in the affirmative, new Houses must be elected and the revision proceeded with. In every case the amendments adopted by the Houses must be voted upon by the people and must be accepted by a majority of the people and by a majority of the Cantons in order to go into force. In reckoning up the votes by Cantons, on such occasions, the vote of a half-canton counts as half a vote.

557. **The Federal Referendum.** — "Federal laws, as well as generally binding federal resolutions, which are not of a pressing nature, shall be laid before the people for their acceptance or rejection upon the demand of 30,000 qualified Swiss citizens or of eight cantons." Such is the language of Article 89 of the federal Constitution which establishes for the Confederation the 'facultative' *Referendum*[1] (sec. 521).

The whole detail of the exercise of the *Referendum* is regulated by federal legislation. A period of ninety days, running from the date of the publication of the law, is set within which the demand for a popular vote must be made. Copies of all federal laws which are subject to *Referendum* are sent to the authorities of each Canton, and by them published in the Communes. For the Communes are constituted the districts in which the popular demand is to be made up. That demand must be made by written petition addressed to the Federal Council; all

[1] Orelli, p. 80.

signatures must be autographic; and the chief officer of the Commune must attest the right of each signer to vote. Demands from Cantons for the *Referendum* are made through the cantonal councils, subject to the right of the people, under the provisions of the cantonal *referendum*, to reverse the action.

In case it appears that 30,000 voters or eight Cantons demand the *Referendum*, the Federal Council must set a day for the popular vote: a day which must be at least four weeks later than the resolution which appoints it.

558. **Functions of the Federal Assembly.** — The functions which the Houses exercise in joint session as the Federal Assembly are not legislative but electoral and judicial. 1. The Assembly elects the Federal Council, the federal judges, the Chancellor, and the generals of the confederate army. 2. It exercises the right of pardon. 3. It determines conflicts of jurisdiction between federal authorities, fulfilling the functions delegated under the French and Prussian constitutions to a special Court of Conflicts (secs. 357, 502).

The President of the National Council presides over the sessions of the Federal Assembly, and the rules of the National Council for the most part govern its proceedings.

559. **Administration of Justice: I. The Cantonal Courts.** — The Cantons are left quite free by the federal Constitution to organize their courts as they please. Not even a general uniformity of system is prescribed as in Germany (sec. 436); nor are the cantonal courts subordinated to the Federal Court except in certain special cases provided for by statute. It may be said, in general terms, that justice is administered by the Cantons, with recourse in selected cases to the tribunal of the Confederation.

There is, however, a certain amount of uniformity in judicial organization throughout Switzerland. There are usually two ranks of courts in each Canton: District Courts (*Bezirksgerichte* or *Amtsgerichte*) which are courts of first instance, and a Supreme or Appellate Court (*Obergericht* or *Appellationsge*

richt) which is the court of final instance. There are also in some of the Cantons Justices of the Peace. Petty police cases are heard by the District Courts subject to appeal to the Supreme Court, just as civil cases are; but for the hearing of criminal cases there is trial by jury under the presidency of a section of the supreme court justices, or by a special criminal court acting without a jury.

560. In three of the larger cantons, Geneva, Zürich, and St. Gallen, there are special Cassation Courts put above the *Obergericht*. Zürich and Geneva have also special Commercial Courts (*Handelsgerichte*).

561. In many of the cantons the Supreme Court exercises certain semi-executive functions, taking the place of a Ministry of Justice in overseeing the action of the lower courts and of all judicial officers, such as the states-attorneys.

562. In most of the cantons, too, the Supreme Court makes annual reports to the legislative Council, containing a full review of the judicial business of each year, discussing the state of justice with criticisms upon the system in vogue and suggestions of reform. These reports are important sources of judicial statistics.

563. The terms of cantonal judges vary. The usual terms are three, four, and six years. The judges of the inferior courts are as a rule elected directly by the people: those of the supreme courts commonly by the legislative Council.

564. In Berne the legislative Council also elects the Presidents of the District Courts; but this is not the usual practice.

565. No qualifications for election to the bench are required by Swiss law except only the right to vote. But here, as well as in regard to the very brief terms of the judges, practice is more conservative than the law. To the higher courts, at least, competent lawyers are generally elected; and re-election is in most cases the rule.

566. In Geneva the States-attorney, instead of the Supreme Court, is given the general duties of superintendence which, outside of Switzerland, are vested in a Minister of Justice; and in other cantons similar officers are given prerogatives much more extensive than are usually associated with such offices elsewhere.

567. **II. The Federal Court.** — The Federal Court was created by the Constitution of 1848. Before that time arbitra-

tion had been the only form of adjudication between the Cantons. Even in creating it, however, the Constitution of 1848 withheld from the Federal Court all real efficacy: its jurisdiction was of the most restricted kind and was condemned to be exercised under the active superintendence of the then omnipotent Federal Assembly. It was one of the chief services of the constitutional reform of 1874 that it elevated the Federal Court to a place of substantial influence and real dignity. It still rests with the Houses to determine by statute the particular questions which shall be submitted to the Court; but its general province, as well as its organization, is prescribed by the Constitution. Doubtless the Federal Court, like the Council of States, is still in a transitional stage, and will ultimately be given a still more independent and influential position.

568. The Federal Court consists of nine judges chosen by the Federal Assembly (with due regard to the representation of the three official languages of Switzerland, — German, French, and Italian) for a term of six years. Every two years, also, the Federal Assembly selects two of these nine to act, the one as President, the other as Vice-President, of the Court. The Court sits, not at Berne, the legislative capital of the Confederation, but at Lausanne.

The Federal Assembly elects, at the same time that it chooses the judges, nine substitutes also, who sit, as occasion demands, in place of any judge who cannot act, and who receive for their occasional services a *per diem* compensation.

The members of the Court may not hold any other office or follow any other business during their term as judges; nor can they be members of any business corporation.

The Court elects two secretaries, one of whom must represent German, the other French Switzerland, — and one of whom must also know Italian.

Seven judges constitute a *quorum* of the Court. The number of judges who sit in any case must alway be an uneven number, including the president.

569. **Criminal Jurisdiction of the Federal Court.** — In the exercise of its criminal jurisdiction the Federal Court goes on circuit. The country is divided into five assize districts (*Assisenbezirke*), one of which embraces French Switzerland; a second, Berne and the surrounding Cantons; a third, Zürich and the Cantons bordering upon it; a fourth, central and part of east Switzerland; and the fifth, Italian Switzerland.

The Court annually divides itself, for criminal business, into three bodies: A Criminal Chamber, a Chamber of Accusation, and a Cassation Chamber. The Criminal Chamber decides at what places in the several Districts assizes shall be held. The places selected furnish, at their own cost, a place of meeting. The cantonal police and court officers serve as officers of this Court.

The Court elects every six years, to hold for the whole term of the Court, two "Judges of Inquest" (*Untersuchungsrichter*) who are charged with the preparation of cases.

A States-attorney appears for the Federal Council in all cases.

570. **Cases in Public Law.** — The jurisdiction of the Federal Court, as determined by statute, covers a great variety of causes. There are (1) Cases in Public Law. These include disputes between Cantons concerning such matters as the fulfilment of inter-cantonal agreements, the settlement of boundary lines, conflicts of jurisdiction between the authorities of different Cantons, and extradition; also the enforcement of agreements between Cantons and foreign governments; and, most fertile of all, cases involving the constitutional rights of citizens, whether those rights rest upon the federal or upon a cantonal constitution.

571. It is considered "the proper and natural province of the Federal Court" in Switzerland "to defend the people and the citizens against abuses of power, whether they proceed from federal or cantonal authorities." Such a province is, however, in the very nature of the case, insusceptible of definite limitations; and the powers of the Federal Court have gradually spread far abroad by reason of the temptations of this vague prerogative. The most usual and proper cases arising under it are infringements of the federal guarantee to the citizen of

equality before the law, of freedom of settlement, of security against double taxation, of liberty of the press, etc., but the Court has gone much beyond these. Its jurisdiction has been extended to the hearing of complaints against cantonal authorities for ordinary alleged failures of justice, such as the Constitution can hardly have contemplated giving into the hands of the Federal Court. The Court has even "brought within the circle of its judgments, cases where the appellant asserts a denial of his claims by a cantonal judge grounded upon merely obstructive motives or an arbitrary application of the law." [1]

572. The Federal Court has also cognizance of contested citizenship cases between Communes of different Cantons. For citizenship in Switzerland is first of all of the Commune. The Commune is, so to say, the unit of citizenship, and it is through communal citizenship that cantonal citizenship is held.

573. (2) **Civil Cases in Private Law.** — The administration of justice between individuals under federal laws is left for the most part to the cantonal courts, which thus serve in a sense as federal tribunals; but if, in any case falling under federal law, a sum of 3000 francs be involved, or if the matter involved be not susceptible of money valuation, an appeal may be taken to the Federal Court from the court of last resort in the Canton. Certain other private law cases, even when they do not involve federal law, may be brought, — not by appeal, but in the first instance, — before the Federal Court upon another principle, because, *i.e.*, of the nature of the parties to the suit, *viz.*: Cases between Cantons and private individuals or corporations; cases in which the confederation is defendant; cases between Cantons; and cases between the confederation and one or more Cantons (sec. 1082).

Cases of the first two of these four classes can be brought in the Federal Court only if they involve a sum of 3000 francs. Otherwise they must be instituted and adjudged in the cantonal Courts.

By agreement of both parties, the jurisdiction of the Federal Court may be invoked in any case in which the subject of litigation is rendered important by virtue of federal legislation.

[1] Orelli, p. 42.

574. A special railroad jurisdiction, too, has been given to the Federal Court, covering cases concerning right of way and the right of eminent domain, and cases in private law between railroads and the Confederation.

575. (3) **Criminal Cases.** — The criminal jurisdiction of the Federal Court covers cases of high treason and of outbreak or violence against the federal authorities, breaches of international law, and political offences which were the cause or the result of disorders which have necessitated the intervention of the Confederation. It may, however, in the discretion of certain authorities, include a variety of matters in addition to these. Federal officers, whose breaches of duty are ordinarily punished upon judgment of the cantonal tribunals, may, by resolution of the Federal Council or of the Federal Assembly, be handed over to the Federal Court to be judged. Cases may even, also, be assigned to the federal tribunal by cantonal constitutions or laws, if the Federal Assembly assent to the arrangement.

The Cassation Chamber of the Federal Court takes cognizance, besides, of complaints concerning judgments of the cantonal courts given under certain fiscal, police, and banking laws of the Confederation.

576. **The Federal Council: (4) Administrative Cases.** — The administrative jurisdiction of the Confederation, which is exercised, not by the Federal Court, but by the Federal Council, includes a great number of important cases. It covers questions touching the calling out of the cantonal militia, the administration of the public-school system of the Cantons, freedom of trade, occupation and settlement, consumption taxes and import duties, freedom of belief and worship, the validity of cantonal elections and votes, and rights arising out of contracts with foreign powers regarding trade relations, the credit to be given to patents, exemption from military service, freedom of passage, etc. In all these cases an appeal lies from the Federal Council to the Houses.

577. **Inter-Cantonal Judicial Comity.** — The Swiss Constitution, in close imitation of the provision on the same subject in the Constitution of the United States, requires that full force and credit be given the judgments of the courts of each Canton throughout the Confederation.

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IX.

THE DUAL MONARCHIES: AUSTRIA-HUNGARY — SWEDEN-NORWAY.

578. The Dual Monarchies. — Midway in character between unitary kingdoms like England and federal states like Germany stand the dual monarchies of Austria-Hungary and Sweden-Norway. These governments have two features in common: each consists of two kingdoms united under a single monarch, and under neither is there any extensive fusion of the political institutions of the two countries thus united. Each kingdom keeps its own institutions, and therefore to a large extent its own individuality: but at the summit of their governments a single throne unites them, and in some things a common machinery of administration. Very interesting and important differences of law and organization, however, separate Austria-Hungary from its northern analogue, Sweden-Norway. The union of Austria and Hungary is much more complete than that between Sweden and Norway: the southern state has what the northern state has not, a common legislative authority, namely, and common departments of administration.

Austria-Hungary.

579. Austria's Historical Position. — The general course of Austrian history I have already noted, in tracing the development of German imperial politics (secs. 374, 381, 398). Until the middle of the present century Austria stood at the

front of German political union; not until 1866 was she deposed from leadership in Germany and set apart to the difficult task of amalgamating the polyglot dual monarchy of Austria-Hungary.

580. **Acquisition of Hungary and Bohemia.** — It was unquestionably Austria's headship in the Empire which enabled the Habsburg princes at once to broaden and to consolidate their domain in the southeastern border-land between Slav and Teuton. Their power and influence within the Empire of course gave them their opportunity to control the destiny of border states like Bohemia and Hungary, lying at Austria's own doors. Both Hungary and Bohemia fell to Habsburg in the same year, the year 1526. The Austrian monarchy, as we know it, may be said to have begun its history with the reign of the Habsburger of that date, Ferdinand I.

581. **Bohemia.** — Bohemia was a Slavonic wedge thrust into the side of Germany. Compassed about by hostile powers, it was a prize to be fought for. Alternately conquered by several neighboring kingdoms, it finally fell into German hands and became an apanage of the Empire. It was as such that the Habsburgers seized it when its throne became vacant in consequence of the extinction of a Luxemburg line of princes. In 1526 their hold upon it was made complete, and in 1547 they were able to make its possession hereditary within their family.

582. **Moravia.** — Moravia also was and is Slavonic. Slavs early drove out its Teutonic possessors, and were prevented from joining the Slavs of the southeast in the formation of a vast Slavonic kingdom only by the intervention of the Magyars, the conquerors of Hungary. This dominant race in the tenth century thrust themselves in between the Slavs of the northwest and those of the southeast, and, driving back the Slavs of Moravia, reduced the once 'Great Moravia' to the dimensions of the present province. Striven for by Hungary, by Poland, and by Bohemia, Moravia finally met her natural fate in incorporation with Slavonic Bohemia (1029), and passed, along with that kingdom, into Austrian hands, in 1526.

[redacted] **Hungary.**—Hungary is the land of the Magyars, a Turanian race which retains even to the present day its distinctive personal features, habits, and language among the native European races about it. After having suffered the common fortune of being overrun by numerous barbaric hordes at the breaking up of the Roman empire, the territory of Hungary became, in 889, the realm of the Magyar duke Árpád, the Conqueror. In the year 1000 the duke Vaik, who had succeeded to the duchy in 997, received at the hands of Pope Sylvester II. the title of "apostolic king" of Hungary, and, under the name of Stephen, became the first of a line of native monarchs which kept the throne until 1301. From 1301 till 1526 kings of various families and origins were placed upon the throne. During this period, viz., Hungary felt the full power of the Turk, since 1453 master of Constantinople. The battle of Mohács, 29 August, 1526, brought terrible overthrow upon the Hungarian forces at the hands of Soliman the Magnificent, and death to Louis the Hungarian king. Louis was childless; his widow, Maria, was sister to Ferdinand I. of Austria; and it was her influence which led the more powerful party of nobles within the kingdom to elect the Habsburger to the throne and so put Austria permanently in the Hungarian saddle. Not, however, until 1665–1671, a period of insurrection in Hungary, did the Habsburgers convert their elective into an hereditary right to the throne.

684. **Transylvania, Slavonia, Croatia.**—Transylvania, Slavonia, and Croatia, annexed at various times to Hungary, passed with Hungary to the house of Habsburg. Except during the period 1848 to 1867, the period during which Hungary was being disciplined for her revolt of 1848-'9, these provinces have remained apanages of Hungary, though Croatia occupies a somewhat distinctive position, and is always accorded a representative of her own in the Hungarian ministry. From 1848 to 1867 Transylvania, Slavonia, and Croatia were treated as Austrian crown lands.

685. **Galicia, Dalmatia.**—Galicia, a district much fought for and often divided, but for some time attached to Poland, came to Austria

upon the first partition of Poland, in 1772. Dalmatia, once part of ancient Illyria, afterwards a possession of Venice, much coveted and sometimes held by Croatia and by Hungary, was acquired by Austria through the treaty of Campo Formio, in 1797.

586. **Bosnia and Herzegovina.** — The Congress of Berlin, 1878, met to fix upon a basis for the new settlements resulting from the victories of Russia over Turkey, added to Austria's multifarious duties as ruler of many races the protectorate of Bosnia and Herzegovina, districts inhabited by a Servian race and long subject to Turkish dominion.

587. **Austria-Hungary: Nature of the Union.** — The present constitution of the Austro-Hungarian monarchy practically recognizes but two parties to the union, Austria and Hungary, namely. Bohemia, for all she has so much individuality and boasts so fine a history of independence, is swallowed up in Austria: only the Magyars of Hungary, among all the races of the heterogeneous realm of the Habsburgers, have obtained for the kingdom of their making a standing of equality alongside of dominant Austria.

588. **Variety of Race.** — The commanding difficulty of government throughout the whole course of Austro-Hungarian politics has been the variety of races embraced within the domain of the monarchy. First and most prominent is the three-sided contrast between German, Slav, and Magyar; within this general classification of the population, again, Slav differs from Slav by reason of many sharp divergencies of history, of speech, and of religion; and outside this classification, there is added to German, Slav, and Magyar a miscellany of Italians, Jews, and others before the sum of variety is complete. This variety is emphasized by the fact that only the Czechs, among all these peoples, have among the larger divisions of the empire a home land in which they are in the majority. In Bohemia and Moravia the Czechs constitute considerably more than half the population; but in Hungary the Magyars, though greatly outnumbering any other one element of the population, are less than half the whole number of inhabitants; and in Austria, though Germans are very

greatly in the majority in the central provinces which may be called Austria proper, they constitute in Austria taken as a whole very little more than one-third of the population.

589. **Home Rule: Bohemia, Hungary.** — At least two among these many races, moreover, are strenuously, restlessly, persistently devoted to independence. No lapse of time, no defeat of hopes, seems sufficient to reconcile the Czechs of Bohemia to incorporation with Austria: pride of race and the memories of a notable and distinguished history keep them always at odds with the Germans within their gates and with the government set over their heads. They desire at least the same degree of autonomy that has been granted to Hungary.

590. Not 'granted' either: perhaps it would be more strictly correct to say the degree of autonomy *won* by Hungary. Dominant in a larger country than Bohemia, perhaps politically more capable than any Slavonic people, and certainly more enduring and definite in their purposes, the Magyars, though crushed by superior force in the field of battle, have been able to win a specially recognized and highly favored place in the monarchy. Although for a long time a land in which the noble was the only citizen, Hungary has been a land of political liberties almost as long as England herself has been. The nobles of Hungary won from their king, Andreas II., in 1222, a "Golden Bull" which was a veritable Magna Charta. It limited military service in the king's army, it regulated taxation, it secured for every noble trial by his peers, it gave order and propriety to judicial administration, it even enacted the right of armed resistance to tyranny. The nobles, too, were entitled to be personally summoned to the national Reichstag. Standing upon these privileges, they were long able to defeat even the absolutism of the Austrian monarchs. Ferdinand I. acquired the throne of Hungary only after recognizing her constitution; not for more than a hundred years did the crown become hereditary in the Austrian house; and not till 1687 did the ancient right of armed resistance lose its legal support.

591. The period of reaction which followed the Napoleonic wars and the Congress of Vienna found kings everywhere tightening where they could the bonds of absolutism: and nowhere were those bonds more successfully strengthened than in Austria-Hungary under the reigning influence of sinister Metternich. 1848, however, saw the flames of insurrection break forth more fiercely in Hungary than anywhere else in terror-struck Europe: only by the aid of Russia was Austria able once more to get control of her great dependency. So completely was Hungary prostrated after this her supreme effort, however, that she had no choice but to suffer herself to be degraded into a mere province of Austria.

592. **The Constitution of 1867.** — Wars and disasters presently came upon absolutist Austria, however, in an overwhelming storm. Thrust out from Germany, she was made at length to feel the necessity, if she would give her realm strength, to give her subjects liberty. Her eyes at last fully opened to the supreme folly of keeping the peoples under her rule weak and spiritless, poor and motionless, in order that her monarchs might not suffer contradiction, she assented, 18 February, 1867, to that constitution which recognized the kingdom, not as Austria's, but as the joint kingdom of Austria-Hungary, and which gave to the empire its present relatively liberal political organization.

593. **Dual Character of the Monarchy.** — The Austro-Hungarian monarchy, although compacted by the persistent forces of a long historical development, is not a unitary state, a territorial and legal unit, but a "real union" simply "of two constitutionally and administratively independent states." This union is, indeed, more substantial than that between Sweden and Norway: the latter has existed less than seventy-five years, and is, as we shall see (secs. 625, 628), but an arrangement by which two kingdoms may subsist under a single king, as partners in international undertakings but as something less than partners in affairs of nearer interest; Austria-Hungary, on the

contrary, held as a dual possession by a single royal house for more than three hundred and fifty years, subjected by that house to the same military and financial services, and left the while in possession of only such liberties as they could retain by dint of turbulent insistence, consists of two countries at many points interlaced and amalgamated in history and in institutional life.

594. **The Fundamental Laws.** — The dukes of Austria at first held their possessions as vassals of the Empire; but they held them under definite and liberal charters which vouchsafed to them most of the substantial attributes of sovereignty. The elevation of the Habsburgers to the imperial throne did not essentially change the relationship of the Austrian dominions to their immediate lords: they continued to be their possessions in the full feudal sense of that term, the rights of their peoples conditioned, indeed, by their own character and history, but in every legal aspect subject to the disposing will of feudal masters. The present constitutional law of the kingdom, therefore, rests upon grants of privilege from the crown (secs. 1139, 1140). It is divisible into three parts: the laws of the union, the laws of Austria, and the laws of Hungary. (a) The laws of the union embrace, besides various other rules concerning succession to the throne, the Pragmatic Sanction of 1713 (sec. 380), which was formally adopted by the representatives of the Hungarian group of states; and the identical Austrian and Hungarian laws, passed in December, 1867, which fix the relations of the two kingdoms to one another and arrange for the administration of their common affairs. (b) The fundamental law of Austria consists of various royal decrees, 'diplomas,' and patents, determining the membership, privileges, etc., of the national Reichsrath and of the provincial Landtags. Of these the chief are five fundamental laws of December, 1867, by which a general reconstruction of the government was effected in agreement with the new constitution given to the u[illegible] that year. (c) The constitutional arrangements of

Hungary rest upon the Golden Bull of Andreas II., 1222, touching the privileges of the Estates (sec. 590); upon certain laws of 1790–'91 concerning the political independence of Hungary, and her exercise of legislative and executive powers; upon laws of 1847–'48 granting ministerial responsibility, annual sessions of the Reichstag, etc.; and upon a law of 1868 (amended in 1873) whereby Croatia-Slavonia is given certain distinct privileges to be enjoyed independently of Hungary. These are most of them older laws than the Austrian. Although able for long periods together to keep Austria at their feet, the Habsburgers have never been able to bring Hungary to a similar attitude of submission. Her constitutional separateness and independence, though often temporarily denied in practice, have never been destroyed. The co-operative rights of the Estates in government, communal self-administration, and the privileges of the free cities have triumphantly persisted spite of all efforts made for their suppression.

595. **The Common Government: the Emperor-King.** — The Emperor of Austria bears also the titles King of Bohemia and 'Apostolic' King of Hungary (sec. 583). He stands at the head, not of one of the branches of the government, but of the whole government in all its branches. In theory, indeed, he alone governs: he makes, Reichsrath and Landtags only assent to, the laws. Laws limit his powers: the sphere of his authority is fixed in each kingdom by definite constitutional provision; but, whatever practical concessions modern movements of thought and of revolution may have compelled, it yet remains the theory, and to a certain extent the fact, of constitutional development in Austria-Hungary that the monarch has himself willed such limitations upon his prerogative as exist. There is, therefore, significantly enough, nothing to be said by constitutional commentators in Austria-Hungary either concerning the king's veto or concerning any special arrangements for constitutional change. It is thought to go without the saying that the monarch's negative will absolutely

kill, his 'let it be' abundantly vitalize, all laws, whether constitutional or other.

Of course limitations upon the monarch's prerogative are not necessarily any the less real because he *may* abrogate them if he dare, so long as the whole disposition and temper of his people and of his times forbid his abrogating them.

596. **Succession, Regency, etc.** — The laws touching the succession to the Austro-Hungarian throne provide so minutely for the widest possible collateral inheritances, that provision for a vacancy is apparently not necessary. Permanent laws vest the regency in specific representatives of the royal house. The royal age of majority is sixteen years.

597. **The Common Ministries.** — The Emperor-king is assisted in his direction of the common affairs of his two kingdoms by three Ministries and an Imperial Court of Audit. There is (1) a *Ministry of Foreign Affairs* and of the Imperial Household, which, besides the international functions indicated by its name, is charged with oversight of the foreign trade and shipping interests of the dual kingdom. (2) *The Ministry of War*, by which the common standing army of the two kingdoms is administered. The legislation upon which the maintenance of this common standing army is based originates with the legislatures of the two kingdoms acting separately. It is, in brief, matter of agreement between the two countries. It covers such points as the size of the army, liability to military service, rules and methods of recruiting, etc., and is embodied in identical laws adopted by the two legislatures.

As commander-in-chief of the army, the Emperor-king has the full right of discipline, full power to appoint, remove, or transfer officers of the line, and the determination of both the war and peace organizations of the army, quite independently of any action whatever on the part of the minister of war. In most other concerns of the military administration, however, his acts require the counter-signature of the minister.

The militia services of the two kingdoms are separate, and separately maintained; but in war the militia of both countries becomes supplementary to the regular army.

(3) *The Ministry of Finance:* acting under the Emperor, the minister of finance prepares the joint budget, apportions the costs of the common administration between Austria and Hungary, sees to the raising of the relative quotas, applies the common income in accordance with the provisions of the budget, and administers the common floating debt. The Ministry of Finance is in addition charged with the administration of Bosnia and Herzegovina.

598. These two countries, although still nominally parts of the Turkish empire, have really, since the Treaty of Berlin (1878), been subject in all things to Austria. The Austrian ministry of finance stands for them in the position of all administrative departments combined.

599. The chief sources of the common revenue in Austria-Hungary are customs duties and direct contributions from the treasuries of the two states. Certain parts of the customs duties are assigned to the common treasury; and such expenses as these are not sufficient to meet are defrayed by the contributions, Austria paying seventy, and Hungary thirty, *per cent.* of the sums needed.

600. **The Economic relations of Austria and Hungary** are regulated in the important matters of commerce, the money system, the management of railroads whose operation affects the interests of both kingdoms, the customs system, and the indirect taxation of industries by formal agreements of a semi-international character entered into every ten years, and brought into force by separate but of course identical laws passed in the national legislatures of both countries. Each state controls for itself the collection of customs duties within its own territory; but Austria-Hungary is regarded as forming but a single customs and trade territory, and the laws touching administration in these fields must be identical in the two countries.

There is a joint-stock Austro-Hungarian bank at Vienna; the two kingdoms have the same system of weights and measures; and there is separate coining but the same coinage.

601. **Patents, Posts, and Telegraphs.** — A common system of patents and copyrights is maintained; and both countries have the same postal and telegraph service.

602. **The Delegations.** — The most interesting and characteristic feature of the common government of Austria-Hun-

gary is the Delegations, which constitute, in germ at least, a common Legislature. There are two Delegations, an Austrian and a Hungarian. They are committees of the Austrian and Hungarian legislatures respectively, consisting each of sixty members, chosen one-third by the upper, two-thirds by the lower chamber of the legislature which it represents; but although thus in form a committee of the legislature which sends it forth, each Delegation may be said to represent the kingdom from which it comes rather than the legislature of that kingdom: for it is not subject to be instructed, but acts upon its own judgment as an independent body. The two Delegations sit and act separately, and may not improperly be described as two parts of a single consultative body, though to them both belong identical functions. Each passes judgment upon the budget of the common administration, each is at liberty to take action upon the management of the common debt, each superintends the common administration, and can freely question and 'interpellate' (sec. 328) the ministers, from whom each hears periodical reports, and over whom each holds suspended a possible impeachment; and each has the privilege of initiative as regards all measures coming within their competence: and these functions are concurrent, not joint. They are, nevertheless, obviously functions which must under such a system be exercised in full agreement: the common administration cannot serve two masters. If, therefore, after a triple exchange of resolutions no agreement has been reached between the two bodies, a joint session is held, in which, without debate, and by a mere absolute majority vote, the question at issue is decided.

The term for which the Delegations are elected is one year. They are called together by the monarch annually, one year at Vienna, the next at Buda-Pest.

In the selection of members of the Delegations the Austrian crown lands (the provinces once separate or independent) are entitled to representation, as is also favored Croatia-Slavonia on the Hungarian side.

When the two Delegations meet in joint session, the number of members present from each must be equal to the number of those present from the other, any numerical inequality being corrected by ballot.

603. **Citizenship.** — There is no common citizenship for the two kingdoms; but in all business relationships the citizens of each state are regarded as citizens of the other.

604. **The Government of Austria: the Executive.** — The governing power rests in Austria with the Emperor. The Emperors of the present day may by no means venture upon the centralization of authority attempted and in part effected by Maria Theresa and Joseph II.; but Austrian constitutional law does not assign duties to the head of the state: it assigns functions to the ministers and grants privileges to the representative bodies. All powers not explicitly so conferred remain with the Emperor. He directs all the administrative activities of the state; he appoints the members of the upper house of the *Reichsrath;* and he in large measure controls legislation. But he must act in administration through his ministers and in legislation through the parliament. The countersignatures of the ministers are necessary for the validity of his decrees; and the will of the *Reichsrath* is indispensable to the determination of the policy and content of all legislation. The only judicial prerogative that remains with him is the power of pardon. On all sides his power is circumscribed by the legally necessary co-operation of other regularly constituted authorities.

605. **The Ministry,** which consists of a Minister-President and seven heads of departments, acts as the Emperor's council, but it does not constitute a board whose majority vote decides administrative questions: action is taken, rather, in each department upon the individual responsibility of the minister at its head. The ministers have a threefold office: they are the Emperor's councillors, they execute his commands, and they are independent administrators of special branches of the public service. They act for the Emperor also in introducing

measures in the *Reichsrath*. They must attend both houses to defend the policy of the executive and to answer 'interpellations.'

There are seven executive departments: Interior, Land Defence, Religion and Education, Trade, Agriculture, Finance, and Justice. The Minister-President has no portfolio.

606. **Legislation: the National and Provincial Legislatures.** — In all legislation of whatever kind the co-operation of the representatives of the people is necessary; but not all of this co-operative privilege belongs to the *Reichsrath*, the national legislative body. Co-operation in the greater matters of legislation is expressly given by law to the *Reichsrath*, but all legislative powers not expressly granted to it belong to the sphere of the provincial *Landtags*.

607. **The Reichsrath.** — The *Reichsrath* consists of a House of Lords and a House of Representatives. To the House of Lords come princes of the blood royal who have reached their majority, the archbishops and certain bishops, nobles of high rank who have acquired hereditary seats in the chamber, and such life members as the Emperor chooses to appoint in recognition of special services to the state, to the church, to science, or to art. To the other house come representatives of the great landowners, of the cities and marts, of chambers of trade and commerce, and of the rural communes. The term of the lower house is six years.

The present number of members in the House of Representatives is three hundred and fifty-three. Representation is apportioned among the several lands which form the Austrian domain; and in Dalmatia the greater tax-payers, instead of the greater landowners, are represented. In the class of landowners women may vote. The franchise — which is partly direct, partly indirect — is made to rest throughout all the classes of voters in one way or another upon property.

The assent of the chambers is required not only in legislation but also for the validity of treaties which affect the trade of the country, which lay economic burdens upon the state,

which affect its legal constitution, or which concern any alienation or extension of territory.

It is the general rule, of course, that the assent of both houses is necessary to every resolution or action of the *Reichsrath;* but an interesting exception is to be noted. If a disagreement arise between the chambers upon a question of finance or of military recruitment, the lowest figures or numbers are to be considered adopted.

The Emperor names not only the members but also the president and vice-president of the House of Lords. He calls and opens the sessions of the *Reichsrath*, and may close, adjourn, or dissolve it.

608. It is within the prerogative of the Emperor, acting with the advice of his ministers, to enact any laws which may seem to be immediately necessary during a recess of the *Reichsrath*, provided they be not financial laws, or laws which in any way permanently encumber the state. But such laws must be submitted to the *Reichsrath* within four weeks after its next assembling (going first to the House of Representatives), and altogether lapse unless submitted to the *Reichsrath* within that time, and sanctioned by it.

609. **The Landtags.** — The greater provinces of Austria possess their own *Landtags*, or legislatures, and to these belong considerable legislative powers. The Emperor names the chairmen of the *Landtags* and their substitutes; he calls, opens, and may close, adjourn, or dissolve the *Landtags*. But their assent is necessary to all laws which affect the provinces which they represent, and their privileges constitute an important part of the total of legislative power which rests with the representatives of the people. The provinces have also extensive rights of self-administration.

610. **Local Government.** — The *Landtags* are of course the most conspicuous organs of self-government; each *Landtag* consists of a single chamber and represents the same four classes of voters that send members to the national *Reichsrath*, — with the addition of a fifth, official class. The administrative organ of the province is a provincial Committee, as in France (sec. 345). Within the province there are, in some parts of the country, circles, which are areas of financial

administration; and throughout the country the smallest areas of local government are the Communes, local bodies which, acting within the commission of general statutes, exercise considerable powers of self-direction through a communal Committee and a communal president chosen, together with a certain number of assistants, by the Committee.

The Communes are organs of the provinces, and their presidents to a certain extent serve the general state administration.

611. **The Government of Hungary: the Executive.** — The king bears substantially the same relations to the other powers of the state in Hungary that he bears in Austria: the directing head of the state, he yet must act in all administrative matters through the ministers, and in all legislative matters through the *Reichstag*. Even his treaty-making power is limited as regards Hungary in the same way that it is limited as regards Austria (sec. 607).

The Hungarian Ministry consists of a Minister-President and, if he hold no portfolio, of eight other ministers: a minister attendant upon the king, a minister of the Interior, a minister of Finance, a minister of Public Works and Communication, a minister of Trade and Agriculture, a minister of Justice, a minister of Religion and Education, and a minister of Land Defence. Added to these there is always also a special minister for Croatia-Slavonia.

The ministers attend the sittings of the chambers and play there the same part that the Austrian ministers play in the *Reichsrath* (sec. 605).

612. **The Reichstag.** — The *Reichstag*, the national representative body, consists of a House of Magnates and a House of Representatives. To the former go all hereditary peers who pay an annual land tax of three thousand florins, the highest officials of the Roman Catholic and Greek churches, certain ecclesiastical and lay representatives of the Protestant churches, fifty life peers appointed by the king, certain members *ex officio*, one delegate from Croatia-Slavonia, and those

royal archdukes who have reached their majority and who own landed estates in Hungary. The House of Representatives consists of four hundred and fifty-three members elected by direct vote for a term of five years.

The franchise rests upon the payment of a small amount of taxes on land or on income. Members of certain learned and professional classes, however, possess the franchise without any property qualification.

The president and vice-president of the upper house are nominated by the king.

As in the case of the Austrian representative bodies, so also in the case of the Hungarian, the king convenes and opens, and may close, adjourn, or dissolve them.

613. **Local Government.** — For purposes of local government Hungary is divided into shires, certain self-administered cities, and Communes. The organization is throughout substantially the same. In each area, — the Commune excepted, — there is a president who represents the central government; in each, without exception, there is a subordinate officer who is executive representative of the local body; and in each there is an assembly, in part representative and in part primary, inasmuch as those who are most highly taxed are entitled to be present.

614. **Croatia-Slavonia.** — There is not in Hungary the provincial organization which we have seen to exist in Austria (secs. 609, 610). Croatia-Slavonia is the only constituent part of the Hungarian lands which has its own separate *Landtag*. The organization of this territory is in all respects exceptional. It has been given legal rights which cannot be taken away from it without its own consent; and it has a distinct administration responsible to its own Landtag. It is nevertheless of course an integral part of the Hungarian monarchy.

Sweden-Norway.

615. **Danes and Northmen.** — The territory of the three northern kingdoms of Denmark, Sweden, and Norway very early became a home of the Teutonic peoples, a nursery of

Teutonic strength, a peculiar possession of Teutonic institutions. It was from this northern land that the fierce Northmen issued forth to win dominions in France, in Russia, and in Sicily; from it, too, came the Dane to lay his strong hand upon England. Its roving giants kept the world in terror of piracy and invasion for centuries together.

616. **Early Institutions of Sweden and Norway.** — The institutions of these strenuous northern folk were of the usual Germanic sort. Sweden and Norway were at first, like all the German countries, divided into a few score of loosely confederated parts held together by no complete national organization or common compacting authority. By degrees, however, the usual slow and changeful methods of consolidation wrought out of the general mass of petty political particles the two kingdoms of Sweden and Norway. In each a dominant family had worked its way to recognized supremacy and a throne. As in other Germanic countries of the early time, so in these the throne was elective; but, as elsewhere, so also here, the choice always fell upon a member of the dominant family, and the kingly house managed most of the time to keep together a tolerably compacted power.

617. **Union of Denmark, Sweden, and Norway.** — Once and again intermarriage or intrigue united Sweden and Norway under the same monarch; once and again, too, Danish power was felt in the Scandinavian peninsula, and the house of Denmark obtained a share in the distribution of authority. Finally, in 1397, a joint council of deputies from the three kingdoms met at Kalmar, in Sweden, and effected the *Kalmarian Union*. This union resulted directly from the marriage of Häkon VI., joint king of Sweden and Norway, with Margaret, daughter of Valdemar of Denmark; the Council of Kalmar only put it upon a basis of clear understanding. It was agreed that the three kingdoms should acknowledge a common monarch; that, in default of heirs of the house then on the throne, the three kingdoms should elect their common monarch, by such methods

of agreement as they could devise; but that, whether under elected or under hereditary monarch, each kingdom should retain its own laws and institutions.

618. **The Independence of Sweden.** — For Norway this union with Denmark proved of long standing. Not until 1814 was it finally severed. Upon Sweden, however, Denmark maintained a very precarious and uncertain hold, now ruling her, again thrust out, and favored the while only by her own power and by the sleepless jealousies of the patriotic but selfish and suspicious Swedish nobles. At length, in 1523, Sweden was able to break finally away from the union. Her deliverer was Gustaf Eriksson, better known as Gustavus Vasa, who by force of a singular genius for leadership and war first drove the Dane out and then established the royal line which was to give to Europe the great Gustaf Adolf, the heroic figure of the Thirty Years' War. Gustaf Eriksson reigned for thirty-seven years (1523–1560), and with him the true national history of Sweden may be said to have begun. The house which he founded remained upon the throne of Sweden until 1818, and under the long line of sovereigns which he inaugurated the Swedish constitution was worked out through a most remarkable series of swings back and forth between the supremacy of the monarch and the supremacy of the royal council. According as the personal weight of the king was great or small did the royal power wax or wane.

619. **Oscillating Development of the Swedish Constitution.** — The old constitution of Sweden associated with the king a powerful council of nobles and an assembly of Estates. In the latter, the *Riksdag* (*Reichstag*), four orders had acquired representation, the nobles, the clergy, the burghers, and the peasants. For two hundred years the constitutional history of Sweden is little more than a changeful and perplexing picture of the ascendency now of the king, now of the Council or of the *Riksdag*, and again of the king, or of the Council and *Riksdag* combined. With Gustaf Adolf (1611–1632) origi-

nated the clumsy plan, retained until the present century, according to which each of the orders represented in the *Riksdag* acted separately in the consideration of national affairs, to the fostering of dissension among them. By dint of the masterful policy of Karl XI. (1672–1697) the power of the crown was made absolute, the Council eclipsed. Karl XII., a great soldier, wasted the resources of the country and thereby prepared the way for a decline of the royal power. 1720 saw a new constitution effected which gave almost entire control of affairs to the Council and to a committee of one hundred drawn from the three first Estates of the *Riksdag*, and 1734 brought forth a new code of laws. Gustaf III., however (1771–1792), again reduced the Council from its high estate, and left to the *Riksdag* nothing but a right to vote against an offensive war. And so the constitution swung backwards and forwards until the present century.

620. **Bernadotte and the Accession of Norway.** — The great change which ushered in the present regime in Sweden came in 1814, when by the Peace of Kiel and the action of the Congress of Vienna, Norway was taken from Denmark and given to Sweden. Karl XIII. of Sweden (1809–1818) was childless; and in 1810 the Swedes, willing to please Napoleon, the master of Europe, chose as prince and successor to the throne Bernadotte, a man who had risen from the ranks to be one of the many distinguished generals bred in the service of Napoleon.

Bernadotte ascended the Swedish throne, with the title of Karl XIV., in 1818, but he had really come into the possession of full royal power in 1811, on account of the failing health of Karl XIII.

It turned out, however, that Bernadotte was more ready to oppose Napoleon than any longer to serve him. He threw the weight of Sweden on the side of the Allies, against the designs of France; and Norway was Sweden's reward when the Allies made their deal at Vienna.

621. **Norway's Fight for Independence and her New Constitution.** — Norway, though willing enough to escape the dominion of Denmark, did not care to exchange for it an equal bondage to Sweden. She refused to accept the settlement of 1814, rose in rebellion against all outside control, framed for herself a liberal constitution, and essayed once more the rôle of an independent kingdom. And her new constitution she managed to keep. Bernadotte compelled her acquiescence in the union with Sweden, but did not force upon her a surrender of the institutions which she had chosen to adopt.

622. The union between Norway and Denmark accomplished at Kalmar had resulted in the absolute power within his Norwegian domain of the common king. Allying himself with the citizen class in the national assembly, the king had been able to crush the nobles, and eventually to destroy all constitutional liberties. This he was the more readily enabled to do because the throne of Norway had early become hereditary and the Norwegian nobles had thus been robbed of that sovereign influence which, under the elective system of Denmark and Sweden, they had long contrived to retain. The new constitution adopted by the Norwegians in 1814 naturally spoke an extreme revolt from the long-hated authority of kings. It was not only extremely democratic, it was also largely doctrinaire and visionary. Its framers, having few Norwegian liberties to build upon, had recourse to the always futile resource of borrowing foreign experience. They embodied in the new fundamental law constitutional arrangements which they had taken from England and the United States and which found no soil of Norwegian habit in which to grow. Still, her new constitution gave Norway a valuable impulse towards regulated political liberty; and, if not carried out at all points, was at least a promise of things hoped for and afterwards to be in great measure attained.

623. **Constitutional Contrast between Sweden and Norway.** — In Sweden there had been no such democratic revolu-

tion; and in point of institutions the two kingdoms were in 1814 very unequal yoke-fellows. Until 1866 Sweden retained her clumsy machinery of four estates in her *Riksdag*, as well as many other constitutional arrangements which made the royal power predominant. Doubtless the standing example of Norway's more simple and liberal constitution had much to do with the revision of the *Riksdag* undertaken in 1866; and it is unquestionable that the democratic ideas embodied in the fundamental law of the Norwegian kingdom have worked as a powerful leaven in Swedish politics. Slowly but surely, and principally by the movement of Sweden, the two countries have drawn towards each other in institutional development.

624. **The Fundamental Laws.** — The present fundamental law of Sweden-Norway consists of three parts: (*a*) the separate constitutional laws of Sweden, (*b*) the separate constitutional laws of Norway, and (*c*) the Imperial *Reichsacte* of August, 1815, which binds the two countries together under a common sovereign. This last is, so far as Sweden is concerned, a mere treaty, having never passed the *Riksdag* as a constituent law of the kingdom; but for Norway it is an integral part of her constitution, having been formally adopted as such by the *Storthing*. (*a*) The separate fundamental laws of Sweden have never been embodied in any single written constitution, but consist of various laws regulative of the succession to the throne passed in the period of dynastic change (1809–1810); of certain portions of the great enactments of February, 1810, which gave to the *Riksdag* an orderly arrangement of its four Estates and regulated the order of legislative business; of the enactments of June, 1868, which, abolishing the fourfold constitution of the *Riksdag*, substituted two popular houses; and of the laws guaranteeing freedom of the press, passed in May, 1810, and July, 1812. Taken together, these laws constitute a body of fundamental provision slowly built up by Swedish statesmen upon the somewhat inconstant bases of Swedish constitutional precedent. Perhaps its most signifi-

cant feature appears in the detail with which the enactments of 1810 enter into the regulation of the order and methods of business in the *Riksdag*. Under the former complicated division of that body into four separate houses minute regulative detail was of course necessary, and, as seen in the laws of 1810, is illustrative of one of the chief and most interesting difficulties of constitutional development in Sweden. (*b*) The constitutional laws of Norway, on the other hand, are, equally from the nature of the case, very much more simple. They consist of the treaty of peace signed by Sweden and Denmark at Kiel, on the 14th January, 1814, whereby Denmark renounced her claim to Norway in favor of Sweden; of the constitution framed by the Norwegians in May, 1814, during the struggle against all foreign control; and of the Imperial *Reichsacte* of August, 1815, which Sweden has continued to observe as a treaty merely, but which Norway has made a part of her constitution.

625. **The Common Government: The King.** — The thong which binds Sweden and Norway together is the authority of their common king; but this authority has one character as respects Sweden and quite another as respects Norway. The fundamental laws of each kingdom constitute it a limited monarchy, but only in Norway does it seem to be the chief object of constitutional provision to limit royal power. Both the active and the obstructive parts of the king in legislation are much more considerable in Sweden than in Norway. In Sweden it rests exclusively with him to formulate what are there denominated 'economic laws,' administrative laws, namely, regulative of trades, commerce, and manufacture, and of mines and forests. He is, moreover, the sole and sovereign author of police regulations, and of laws controlling vagrancy; he has power to make rules concerning the erection of buildings and to originate ordinances touching sanitary precautions and protection against fire. As regards all other laws he must act jointly with the *Riksdag;* but his veto is in every case absolute.

The *Riksdag* may of course advise the king concerning the economic and administrative legislation entrusted thus exclusively to him; but any action it may take has the force of advice only. The only control it can exercise in such cases comes to it through its money power: it may withhold the money necessary to the carrying out of administrative or economic ordinances determined upon by the king.

626. In Norway, on the other hand, the king has no independent legislative powers, except during recesses of the *Storthing;* and his veto is only suspensive. Certain police regulations and certain ordinances touching particular branches of industry he may issue while the *Storthing* is not in session, but these are of force only until the *Storthing* comes together again. His veto of bills passed by the *Storthing* may be overridden by the passage of the same bill (it must continue literally the same) by three successive *Storthings.*

This, of course, renders the passage of bills over his negative an extremely tedious and difficult undertaking, and usually, in case of a very urgent disposition on the part of the *Storthing* to have its own way, a compromise measure is finally adopted, often at the express suggestion of the king. In two notable instances, however,—the abolition of nobility (1821), namely, and the establishment of ministerial representation in the *Storthing* (1884),—the veto was overridden, through the persistence of the *Storthing*, by means of the constitutional passage of the measures proposed.

627. **The Throne.**—The royal majority is fixed at eighteen years. Women are excluded from the succession. The king must be of the Lutheran faith. He takes the throne under oath to obey the constitution and laws of the kingdom, and he must temporarily lay down the governing power when sick or out of the country, except when absent in the field of battle.

In case a vacancy occurs, the throne is to be filled by election, the choice to be made by the *Riksdag* and the *Storthing* acting separately, if they can agree; or, if they cannot agree, by a joint committee of seventy-two (thirty-six from each body) assembled at Carlstad. This committee is to choose between the two candidates by secret ballot.

In the event of an interregnum or of the minority of the king, the administration of the two kingdoms is to be undertaken by a joint Council of State, consisting of the ten ordinary state councillors of

Sweden and ten special representatives of Norway (sec. 596). If the interregnum or minority continue more than a year, however, the national representatives must be called together and given an opportunity to make other arrangements. If the king be sick or absent, his heir, if of age, governs in his stead.

628. **Foreign and Common Affairs.** — Almost the only common affairs of the two kingdoms which are matters, not of agreement between them, but of sovereign action on the part of the king acting for both, are those affairs which affect the relations of Norway and Sweden with foreign countries. In this field of foreign affairs the king has power to declare war and conclude peace, to form or dissolve alliances, to use ships of war or troops, to send or recall ambassadors, — has, in brief, all the prerogatives of sovereignty. His power to act thus for both kingdoms does not, however, merge Sweden and Norway as regards international relations: they retain their separateness and individuality in the family of nations; and the king may, and often does, conclude treaties affecting one of his kingdoms only. Peace and war are of course, however, common to both kingdoms.

629. The king is assisted in these functions by no common minister of foreign affairs: he acts through the Swedish minister, Norway having no minister of foreign affairs at all. Certain other ministers of state must be present when the Swedish foreign minister lays diplomatic affairs before the king; and when such matters directly affect Norway a Norwegian minister of state must be present.

Norwegians find ground for serious objection to the present constitutional arrangements existing between the two countries in their own too slight hold upon the conduct of foreign affairs.

630. **War.** — If, in the exercise of his great international functions, the question of war arise, the king must take the opinion of a joint Council of the two kingdoms (sec. 634), but he is not legally bound by its opinions. He must himself assume the full responsibility of deciding the question.

631. A certain limitation rests upon the royal power as regards the use of the Norwegian forces. He may freely call out the whole military

force of Sweden, both land and naval, but he may not use the Norwegian troops of the line without the express consent of the *Storthing*. The Norwegian militia, moreover, cannot under any circumstances be employed outside of Norway, and it is within the competence of the *Storthing* at any time to increase the militia at the expense of the regular line. It has indeed actually done this.

632. **Legislative Control of Foreign Relations.** — Of course, too, the king must in every exercise of his royal powers act within the limits of the fundamental law. He cannot enter into any agreement with a foreign country which is not consistent with the constitutions of his kingdoms; he may not conclusively pledge the legislatures of his kingdoms to any action or to any expenditure of money; and he is of course in a large measure dependent upon their co-operation for the execution of treaties. But these are the familiar limitations of modern representative government.

633. **Concurrent Legislation.** — Matters which are of common interest to the two countries, but which lie outside of the prerogatives of the common king, are regulated by concurrent identical resolutions or laws passed by the *Riksdag* and the *Storthing* severally.

Important examples of such concurrent laws are those which affect the money systems of the two countries, and those which concern the Lapps.

634. **The Joint Councils.** — The place of a common ministry to advise the king touching questions which affect the interests of both kingdoms is taken in Sweden-Norway by a complicated system of Joint Councils of State. Whenever any matters are considered in the Swedish Council of State at Stockholm which concern Norway also, the Norwegian minister resident and the two Norwegian Councillors who attend the king must be called in; and whenever practicable the opinion of the whole Norwegian Administration must be sought and obtained. Whenever, on the other hand, matters which directly affect Sweden are under debate in the Norwegian Council of State at Christiania, that Council must likewise be strengthened by the presence of three Swedish ministers. There is thus both a

Swedish-Norwegian and a Norwegian-Swedish Joint Council of State; and not a little doubt exists among publicists in the two kingdoms as to what particular matters are proper to the consideration of one and what to the consideration of the other of these anomalous bodies. The whereabouts of the king serves as a rough criterion as to the predominance of Sweden or of Norway in these Councils.

The sphere of these Councils is quite extended. It includes the consideration of questions of war and peace, the oversight and the costs of the diplomatic service, inter-territorial relations, the balance of financial accounts between the two countries, and all reciprocal affairs in which the intimate co-operation of the two kingdoms is necessary.

635. **Citizenship.** — There is no common citizenship for the two kingdoms, although Swedes are allowed by Norwegian law to acquire citizenship in Norway by mere residence. Certain reciprocal advantages are, however, of course accorded: citizens of either country may, for instance, own land in the other; interstate trade is encouraged, and a joint-ownership of vessels is facilitated.

Legal banishment from one kingdom is banishment from the other.

636. **The Government of Sweden.** — In all matters of internal legislation and administration the two kingdoms are as distinct as if no legal relations existed between them. Each has its own separate treasury, its own bank, its own money system, its own army and navy; and each has its own complete administrative and legislative organization.

637. **The Swedish Executive: The King and Council.** — Sweden's theoretical development in the field of constitutional law has been less complete than her practical development. Her fundamental law recognizes only a twofold division of governmental powers, into Executive and Legislative. Judicial power is supposed to reside in the king, and is in theory indistinguishable from the Executive power. As a matter of practice, however, though the king nominates the judges, they

are quite as independent of him as they would be were Swedish theory upon this head more advanced.

638. The position and character of the Swedish Executive are in some respects peculiar. The king is charged to a quite extraordinary extent not only with the general oversight but also with the detail of administration: the ministers are not so much directing heads of departments as councillors of state assigned the duty of advising the monarch. They have seats in the *Riksdag* with a full voice in all its debates and the right, exercised in the name of the king, to initiate legislation. This connection with the legislature involves also, as a natural consequence, frequent resignations of the ministers in cases of unalterable disagreement between themselves and one or both of the chambers; but ministerial responsibility is not as yet a recognized principle of the constitution. Not only the full equality of the two chambers stands in the way of its development, but also the authority of the king. The ministers serve too many masters to be altogether responsible to any one of them. In respect of her Executive, therefore, Sweden may be said to stand half-way between England and France, where ministers are wholly responsible to one house of the legislature, and Germany, where the ministers are responsible to the sovereign alone.

639. The executive departments in Sweden are the following seven: Foreign Affairs, Justice, Land Defence, Sea Defence, Civil Affairs (Interior), Finance, Ecclesiastical Affairs. At the head of the Council of State (the collective ministry) stands a prime minister who is not generally assigned any specific executive duties. The division of business among the departments rests entirely with the king. Although the king governs, however, so far as one man may, every decree which he issues must be countersigned by the head of the department whose affairs it concerns.

640. **The Riksdag.** — The national *Riksdag* consists, as in most other governments, of two chambers. Of these one, the up[illegible]mber, consists of one hundred and forty-three mem-

bers chosen for a term of nine years by the representative bodies of the counties and the councils of the larger towns: these electoral bodies being in their turn chosen upon the basis of a complicated communal franchise granted chiefly on property or income. The lower house, numbering two hundred and twenty-two members, is chosen for a term of three years by the electors of the towns and of the rural districts, either by direct or by indirect vote as a majority of the electors prefer. The rural districts are allowed one member for every forty thousand inhabitants, the towns one for every ten thousand inhabitants, the latter being thus given the preference in representation.

This does not, however, result in the return of a majority of town members. Only seventy-six members are returned by the towns, one hundred and forty-six by the rural districts.

In a majority of the electoral districts the vote is now direct, by choice of the electors.

The proportion of representation in the upper house is one member for every thirty thousand inhabitants. The rural population has by this arrangement a larger representation in the upper than in the lower house. Only the municipal councils of those towns participate in the elections to this house whose population is not represented in the county councils. Such towns are only four in number: Stockholm, Göteborg, Malmö, and Norrköping.

The members of the upper house are not elected for a *joint* term of nine years, but each member is chosen to serve that length of time: so that if any member be chosen to fill a vacancy his term will, of course, overlap the terms of the members previously elected. The body is thus given a sort of continuous existence.

641. **Joint Legislation upon Financial Questions.** — It is a peculiarity of Swedish constitutional arrangements that, under some circumstances, the two houses are fused. Legislative business is under the general direction of a joint committee of the two chambers, and in case of a difference of opinion between the houses upon financial matters a decision is reached in joint session. The houses meet in joint session for no other purpose, however.

642. **Local Government.** — Local government rests in Sweden upon very ancient historical foundations. The primitive Germanic institutions of self-government have there never been entirely overlaid or lost. In the Communes, the oldest and, so to say, most natural areas of local administration, there is almost complete autonomy, the people themselves acting, where the size of the community does not forbid, in primary assemblies, quite after the immemorial fashion. The counties are more artificial constructions of a later date and are presided over by officers appointed by the king; but in them also popular representatives play an important supervisory part.

643. **Changes in the Constitution.** — Changes in the constitution can be quite simply effected. If proposed by one *Riksdag* and adopted by the next (the next after an election for the lower house) they become, with the royal assent, incorporated parts of the fundamental law.

644. **The Government of Norway: The Norwegian Executive.** — The king stands in substantially the same relations to his Council in Norway that he occupies towards his Council in Sweden: the supreme deciding authority is his. Alike in Norway and in Sweden he must take the opinion of his ministers upon public questions; and when he is in Sweden he may not take any decision upon Norwegian affairs without hearing the advice of the three Norwegian councillors who attend him there. On important Norwegian measures not demanding haste he must even, when in Sweden, ask the written opinion of the whole Norwegian Council. But the decision is his in any case. His constant absence in Sweden, however, gives a weight in government to the Norwegian Council which its Swedish counterpart never possesses. The king must leave to the Council, acting under the presidency of a viceroy or of the prime minister, the major part of the governing authority, including even his veto; and his power to reverse its action is strictly limited. As regards their rela-

tions to the national legislature the Norwegian do not differ greatly from the Swedish ministers. They sit, without voting, in the *Storthing;* they have the privilege of initiative, and they are under no constitutional obligation to resign in case of defeat (sec. 638).

645. The Norwegian Council of State consists of two parts, (*a*) a minister of state and two councillors, all three of whom accompany the king, and (*b*) the 'Government' proper, consisting of a minister of state, as prime minister, and six or seven other ministers, according as the prime minister has or has not a portfolio. For the administrative departments in Norway, as in Sweden, are seven in number; namely, Ecclesiastical Affairs, Justice, Interior, Finance, War (including, since 1885, the navy), Public Works, and Audit. The division of business among the several departments rests with the king.

646. **The Storthing.** — The national *Storthing* has a character and constitution quite peculiarly its own. It is, in fact, a single body, elected as a whole, but self-divided for ordinary legislative business into two sections, a *Lagthing* and an *Odelsthing.* It is chosen for a term of three years and consists of one hundred and fourteen members, thirty-eight (or one-third) of whom are returned by the towns, seventy-six (or two-thirds) by the rural districts.

This proportion is fixed by law and can be changed only by constitutional provision.

The franchise rests upon a property qualification, and the voting is indirect. In the cities the secondary electors are chosen in the proportion of one to every fifty voters; in the country districts in the proportion of one for every one hundred voters.

647. Upon the assembling of a new *Storthing* one-fourth of its members are selected, by the *Storthing's* own vote, to constitute the *Lagthing;* the remaining three-fourths constitute the *Odelsthing;* and with the *Odelsthing* remains the right to originate all measures of legislation. The *Lagthing* is thus, as it were, merely a committee of the *Storthing* set apart as a revisory body, a sort of upper chamber. It is only with regard

to ordinary bills, however, that the *Storthing* acts in this way as two houses. Constitutional and financial questions it considers as a single body.

In case the *Lagthing* twice rejects any measure sent to it by the *Odelsthing*, the difference is decided in joint session by a two-thirds vote.

648. **Local Government.** — Local government in Norway does not rest upon the same undisturbed foundations of historical tradition which in Sweden uphold it. The laws which give to it its organization date from 1837. By these the country is divided into districts and communes, in the government of both of which the people are represented, but in both of which officials appointed by the central Government exercise considerable powers of oversight and control.

649. **Changes of Constitution.** — Constitutional amendment is effected in Norway substantially as in Sweden. Proposals of amendment must be introduced at the *first ordinary session* of the *Storthing* held after an election, and must be finally acted upon, without alteration, during the first session of the next *Storthing*. The votes of two-thirds of the members present are required for the passage of such amendments, and the king's veto operates as in other cases (sec. 626).

650. **The Two Countries.** — More than seventy years of successful union (1814–1889) now stand behind this singular dual monarchy of Sweden-Norway. The attitude of Sweden towards her partner land has been marked during most of this period, as the attitude of the stronger towards the weaker party should be, by not a little forbearance and consideration. The two countries have concurred in removing also all the more serious causes of possible commercial irritation between them, — each opening its markets to the natural products of the other. Sweden, nevertheless, has the preponderant weight and influence in all common affairs, particularly, of course, in the regulation of the foreign relations of the two kingdoms (sec. 628). Her policy, moreover, is often, when considered from Norway's

point of view, a Swedish policy merely, looking directly or indirectly towards Swedish control. Not a few causes of jealousy, not a few points of friction, remain in the system. An influential party in Norway, therefore, of course desires an even larger measure of independence and home rule than is now possible without fundamental constitutional change, suspecting, probably not without just cause, that it is the object of a certain party, at any rate, if not of all parties, in Sweden, to weaken the guarantees of liberty now existing, and to draw Norway even further within the circle of Swedish control. The future, it would seem, must assuredly bring forth either greater consolidation of the dual government or a new and better, because closer, scheme of confederation.

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X.

THE GOVERNMENT OF ENGLAND.

I. Central Government.

651. **Origin of the Constitution Teutonic.** — The history of government in England, as in Germany, begins with the primitive politics of the Teutonic races. Those great race movements of the fifth century which put the Frank in the Roman's place in Gaul put the Angles and Saxons in the place of the Roman in Britain. The first Teutons who made a permanent settlement in Britain (A.D. 449) did not find the Roman there; the imperial legions had been withdrawn from the island almost forty years before (A.D. 410) to serve the Empire's greater necessities in her contest with invading hosts nearer home. But the new-comers from the lowlands about the Elbe and the Weser found there many splendid and impressive monuments of the civilization which everywhere kept company with Roman dominion. What effect these evidences of the displaced system of Rome may have had upon the rough seamen who made the new conquest, or how much of Roman influence may have remained with the people of Britain to be handed on, in faint reproduction, to future masters of the island, it is impossible to say. Certainly, however, there was nothing of Rome's handiwork in the forms of government which the Teutons established at the basis of English politics. Those forms were their own. They were reproductions, as nearly as the conditions of conquest would allow, of the in-

stitutions which the Romans had seen in use among their redoubtable foes beyond the Rhine before ever the Empire had suffered serious inroad.

652. **Primitive Teutonic Institutions.** — These institutions had none of the national character which they were in the course of time to acquire. They illustrated the well-known historical sequence, in which local government always precedes central government. Men governed themselves as families and small communities, before they were governed as nations. For the Germans of that early time the village was the centre of political life; national organization they at first scarcely knew except for purposes of war; kingship among them was honorary and typical rather than real. The freemen of each little community in times of peace directed their own affairs with quite absolute freedom in village meeting. Even in war each freeman had a vote in the distribution of booty and could set his own imperative individuality as a more or less effectual check upon the wilfulness of his commander (secs. 162–165). A very fierce democratic temper seems to have ruled in the politics of that rough primitive time. And it is not at all likely that this temper was a whit abated among the hardy pirates, as tempestuous as the northern waters which they braved, who founded new kingdoms in Britain in the fifth century.

653. **Institutional Changes effected by Conquest.** — It was kingdoms, however, and not mere loose tribal confederacies, which they established. Concerted, organized movements for conquest did the same thing for the Angles and Saxons that they did for the Franks (secs. 234, 235): they made real kingship necessary as an abiding basis for national organization. The military leader was of necessity constituted permanent king, the same cohesion being needed to follow up and enjoy conquest that had been needed to effect it. But the new kingdoms were at first quite small, — small as the island was, it held many such, — and the internal organization of the t

was probably not deeply affected by the fact that a throne had been set up. The people gathered, as was their long-time, their immemorial wont, into more or less compact but always small communities, enjoying their lands according to some system of common ownership which left the chief pastures and the principal water supply open to use by all and reserved only the arable land to separate use by individuals, — a separate use which individuals enjoyed, however, subject to the control of the community. Justice and government still proceeded, as of old, from the meeting of village freemen.

654. **The Hundred-moot and the Folk-moot.** — But there was, besides this local organization time out of mind habitual with the Germans, a wider organization possessing features which possibly had not been known in forms quite so fully and symmetrically developed and integrated in earlier Germanic practice. Communities were combined into 'hundreds,' and it was a combination of 'hundreds,' doubtless, that constituted the little kingdoms of the first periods of Saxon dominion, — some of which at any rate became the 'shires' or counties of the later times when all England was united under one rule. The 'hundred,' like the smaller units of the system, the several villages or communities, had its 'moot' or meeting, composed of the priest, the reeve, and four men from each township within its limits. The principal functions of this hundred-moot were those of a court: for the hundred was distinctively a judicial rather than an administrative district. Above the hundred-moot, at the top of the primitive system, was the general folk-moot, a general assembly of the freemen, playing the same part of tribal or national council that Tacitus had seen similar assemblies play in Germany in the first century.

655. **English Kingdom and English County.** — When the English kingdoms were many, each, probably, had its general council, which sat under the presidency of the king, and which advised with him concerning the common interests with some

at least of the old authoritativeness which its conclusions had possessed before the new kingship had been created. When England had been made a single kingdom, in the later days when the Norman conquest was drawing near, these divisions of the land, these kingdoms which had once had such independent political life, sank to the rôle of counties, and their folk-moots, which had once been in a sense national assemblies, became mere shire-moots, mere county courts, presided over by the sheriff as representative of the king, the bishop as representative of mother Church, and the ealdorman as representative of the nation, and composed of the landowners of the shire, the reeve, priest, and four men from each township, twelve representatives from each hundred, and all officials.

656. **The Witenagemot.** — National authority, meantime, had passed, so far as it had passed to any assembly, to an assembly of another kind, to a great council called the *Witenagemot*, or assembly of the Wise. We have no certain knowledge of the exact character of this famous national body; but we are probably warranted in concluding that it was formed more or less closely upon the model of the assemblies which it had displaced. The national councils of the smaller kingdoms of the earlier time, which had now shrunk into mere shire courts, handed on their functions of general counsel, and also, no doubt, in theory at least, their organization, to this *Witenagemot*, the representative of a wider nationality. Probably it was within the right of every freeman to attend and vote in this great meeting of the nation; but as a matter of fact, its membership was limited, apparently from the first, to the chief men of the shires and of the royal household. To it came the sheriffs, the ealdormen, the bishops, and chief officers and thegns about the king's person.

657. **Powers of the Witenagemot.** — Its powers were very great indeed, in theory always, perhaps at first in practice also. To it belonged the old popular prerogative of electi
occasion deposing, the king. It gave or withhel

to grants of the public land. It was the supreme court of the kingdom, for both civil and criminal cases. It shared with the king the law-making and appointing power, and joined him in the imposition of taxes. As the king grew in power and influence, the co-operation of the *Witenagemot* in judgment and legislation became more and more a matter of form only; but always there were two or three yearly meetings of the body, and its action, though in most things merely formal and perfunctory, was yet a necessary and, symbolically, a valuable form, preserving, as it did, the memory, if no more, of the nation's freedom.

658. **The Norman Feudalization.** — With the Norman conquest came profound changes in the government of England. The chief officers of the shire became royal officers merely, the ecclesiastical authority being set apart to itself, and the ealdorman being shut out from all administrative functions. The land William confiscated, in the ruthless thoroughness of his conquest, in vast quantities, because of the stubborn resistance of its English owners, and granted to Normans or to submissive Englishmen to be held in feudal subjection to himself. The feudal system, so familiar to the historian of the continent, with its separated baronial jurisdictions and its personal dependencies of vassal upon lord and of lord upon overlord, began to be developed in England also. Township courts in most places gave way to baronial courts; hundred-moots lost their one-time importance; and all judicial power that did not pass into the hands of feudal lords tended to pass to the court of the sheriff, the king's lieutenant in the shire. Still William kept the barons under; he did not suffer their power to become threatening to his own, but kept them always dependent upon himself for the continued exercise of their privileges.

659. **The Great Council of the Norman Kings.** — More important still, he preserved, with modifications to suit his change of system, the national assembly of the Saxon polity. He claimed to come to the throne by natural right and legal suc-

cession, not by conquest, and he sought to continue, as far as might be, the constitution under which he claimed succession. He sought and obtained formal election to the throne, as nearly as possible in accordance with the ancient forms; and, his throne secure, he endeavored to rule within the sanction of ancient custom. He maintained the *Witenagemot*. But of course its character greatly changed under his hands. Revolt hardened his rule, to the exclusion of the old national element from the central assembly of the realm. As the new organization of the country assumed a feudal character of the Norman type, that new character became mirrored in the composition of the national council. The *Witenagemot* merged in the Great Council (*magnum* or *commune concilium*) of the king's tenants-in-chief. To it came at first, besides the earls, the barons, and the knights, who either in fact or in feudal theory held their lands of the king, the archbishops also, the bishops, and the abbots; subsequently, however, even these ecclesiastical members were admitted only as barons, as holding land of the king and so members of the feudal hierarchy. In theory, it would seem, every landowner was entitled to claim a seat in this Council; it was meant to hold the place of a national assembly which could speak for the governing classes; but in fact only the greater barons and churchmen as a rule attended, and 'tenure by barony' became at length the exclusive valid title to membership. The development of this body, the Great Council of the Norman kings, is the central subject of early English constitutional history; for from it may be said to have sprung the whole effective organization of the present government of England. Out of it, directly or indirectly, by one process or another, have been evolved Parliament, the Cabinet, and the courts of law.

660. **The Feudal System in England.** — England was not feudalized by the Normans. Feudalization had grown there, as elsewhere, with the growth of Teutonic politics, under Saxon and Dane as under Frank and Goth. Society in England, as on the Continent, had divided

into ranks of nobles, freemen and slaves bound together by personal fealty and the principles of landownership. What the Norman did was to give new directions to the indigenous growth of feudalism. The system had not gone to such lengths of disintegration in England as it afterwards went on the Continent, and William the Conqueror's first care when compacting his power in the island was to subordinate all feudal elements permanently to the crown. He saw to it, by the unhesitating use of his great power, that no baron should be able to cope with the king without wide combination with other barons, such as watchful kings could probably always prevent; and he dulled the edge of hostile feeling by giving to the greater barons of the kingdom a function of weight in the management of affairs by bringing them into peaceful and legitimate combination in the Great Council, which he called together three times every year, and whose advice he never refused at least to hear. That Council retained, formally at any rate, the right to choose the king, and all laws were declared to be enacted by and with its advice and consent.

661. **Character of English Institutional Growth.** — It has been noted as a leading characteristic of the constitutional history of England that her political institutions have been incessantly in process of development, a singular continuity marking the whole of the transition from her most ancient to her present forms of government. It is not a history of breaks or of new establishments, or of successive new creations of instrumentalities of legislation and administration: all the way through it is a history of almost insensible change, of slow modification, and of unforced, almost of unconscious, development. Very great contrasts appear between the character of her government in one age and its character in another age distant one or more centuries from the first; but it is very difficult to perceive any alteration at all when comparison is made from generation to generation. Almost no changes can be given exact dates: each took place 'about' such and such a year, or in this or that long reign. The whole process, therefore, is one which may be outlined in quite brief epitome: its stages are long, its features large, its details unessential to clearness. It is possible to trace the evolution of the ordered

system of Parliament, Cabinet, and courts out of the nebulous mass of the Great Council without burdening the recital with too great a weight of particulars.

662. **The Course of Development.** — In briefest summary the facts are these: the Great (or National) Council itself became the Parliament of the realm; those of its members, as originally constituted, who were state officers and chief officials of the court became a Permanent royal Council, out of which, in course of time, grew the more modern Privy Council and at length the Cabinet; and those members of the Permanent Council whose duties were financial and judicial gradually drew apart from the rest for the exercise of their functions, their work being finally divided among them according to its nature, and the several bodies into which they thus fell becoming, in the end, the courts of Exchequer, of Chancery, and of common law.

663. **The Permanent Council.** — The body of state and court officers whom the king kept about him as his 'Ordinary' or Permanent Council were originally all of them members of the Great Council and seem at first to have acted as a sort of "committee, or inner circle," of that greater body. The Great Council met but three times in the year; its organization was not permanent; its membership varied, both numerically and personally, from year to year. The officers of the permanent service, on the other hand, were always within easy reach of consultation; they were in a certain sense picked men out of the larger body of the national Council; it was natural that they should be consulted by the king and that their advice, given in their collective capacity as a smaller council, should carry with it the weight of their connection with the more authoritative Great Council. As a matter of fact at any rate, they acquired powers almost coincident with those of the national body itself. Their powers came, indeed, to possess an importance superior even to those of the more august assembly, being exercised as they were, not intermittently or occa-

sionally, but continuously; not with a mere outside acquaintance with the posture of affairs, but with an inside intimacy of knowledge.

664. **Composition of the Permanent Council.**— Under the Norman kings the membership of the Permanent Council consisted, usually, of the two archbishops (of Canterbury and of York), the Justiciar, the Treasurer, the Chancellor, the Steward, the Marshal, the Chamberlain, and the Butler, with the occasional addition of other officials, such as the king's Sergeant, and of such bishops and barons as the sovereign saw fit from time to time to summon. There was, however, no fixed rule as to its composition. Possibly every baron, as a member of the Great Council, could, if he had so chosen, have attended the sittings of this section of the Great Council also, which, while the Great Council was not in session, masqueraded as its deputy and proxy. Practically it would seem always, as a rule, to have lain within the king's choice to constitute it how he would.

665. **The Powers of the Permanent Council** were enormous: were as large as those of the king himself, who constituted it his administrative, judicial, and legislative agent. Its "work was to counsel and assist the king in the execution of every power of the crown which was not exercised through the machinery of the common law";[1] and "the king could do nearly every act in his Permanent Council of great men which he could perform when surrounded by a larger number of his nobles; except impose taxes on those nobles themselves."[2]

But the Permanent Council very early ceased to act as a whole in the discharge of all its functions alike. Itself a committee, it presently, in its turn, began to split up into committees.

666. **The Law Courts.** — Men specially learned in the law were brought into its membership, the later kings not hesitat-

[1] Stubbs, *Constitutional History of England*, Vol. III., p. 252.

[2] A. V. Dicey, *The Privy Council*, p. li.

ing, when the needs of the service demanded, to introduce commoners, as the Council drifted away from even its nominal connection with the Great Council; and to these the financial and judicial functions of the crown were more and more exclusively entrusted. (Compare sec. 293.) It was not long before (*a*) a separate *Court of Exchequer*, which was at first charged principally with the audit of finance accounts, had been permanently assigned its special 'barons' as Justices, and had acquired jurisdiction over all cases in which the king was directly concerned; (*b*) another special bench of judges had received, as a *Court of Common Pleas*, jurisdiction over all civil cases between subject and subject; (*c*) still another, as a supreme court, or *Court of King's Bench*, which always accompanied the sovereign wherever he went and which was in theory presided over by the king himself, had been empowered to supervise local justice and itself control all cases not specially set apart for the hearing of other courts; and (*d*) the Chancellor, who had once been merely president, in the king's absence, of the Permanent Council when it heard appeals in its judicial capacity, had absorbed to himself, in his *Court of Chancery*, the whole of that so-called 'equitable' function of the crown by virtue of which the king had granted relief to suitors for whose cases the common law had provided no adequate process. The Chancellorship was thus put in the way of attaining to its later-day partial ascendency over the 'courts of law.' This process of the differentiation and development of the courts began in the early years of the twelfth century and may be said to have been completed by the middle of the fourteenth.

667. **Parliament.** — Meantime the national body, the Great Council, from which the Permanent Council and courts had in a sense been derived, had had its own expansions and changes of form and had taken on a new character of the utmost significance. Not greatly altered in its composition during the century which followed the Norman conquest, the Great Coun-

cil was profoundly affected by the outcome of Magna Charta (A.D. 1215) and the momentous constitutional struggles which followed it. It was then that the principle of *representation* was first introduced into the constitution of Parliament and commoners as well as nobles given seats in the national assembly. The archbishops, bishops, and abbots attended as of course, as always before, and the earls and greater barons held themselves equally entitled to be summoned always by special personal summons; but the lesser barons, who formerly had been called to the Council, not by personal summons, but only by a general summons addressed to them, along with all tenants-in-chief, through the sheriffs of the counties, had given over attending because of the expense and inconvenience of the privilege, and were accordingly no longer called. Their place was filled by representation. Writs addressed to the sheriffs, commanding the necessary elections to be held, called for representatives of the lower clergy and, more important still, for representatives (knights) of the shires and (burgesses) of the towns. The Parliament which Edward I. summoned in 1295 contained all these elements and established the type for the composition of all future Parliaments.

668. In the fourteenth clause of Magna Charta John was made to promise that, besides summoning the archbishops, bishops, abbots, earls, and greater barons severally, by special personal letters, he would summon all lesser barons also by a general summons, through the sheriffs and bailiffs. But this general summons failed of the desired effect.

669. Representatives from the towns were summoned first in 1265 by Earl Simon of Montfort, who knew that he could count upon the support of the Commons of England in his contest with the king, Henry III., and who called burgesses to the Parliament which he constituted during the brief period of his supremacy in order to give open proof of that support. Edward I. followed Montfort's example in 1295, not because he was deliberately minded to form a truly representative assembly as a wise step in constitutional development, but because he wanted money and knew that taxes would be most readily paid if voted by an assembly representing all.

670. Representatives from the shires (knights) had often been called to Parliament before 1265. Step by step first one element of the nation and then another had been introduced into Parliament: first the lesser barons, by general summons, — only, however, to drop out again, — then the gentry of the shires by election in the counties, finally the burghers of the towns by similar election in county court.

671. **Genesis of the Two Houses.** — Such a body as the Parliament summoned by Edward was, however, too conglomerate, too little homogeneous to hold together. It did not long act as a single assembly; but presently fell apart into two 'houses.' Had the lower clergy continued to claim representation, there might and probably would have been three houses instead of two. But, instead of setting up a separate house in the civil Parliament, they drew apart for the creation of an entirely distinct body, which, under the name of 'Convocation,' was to constitute a separate ecclesiastical parliament, devoting itself exclusively to the government of the church. Their share in the management of temporal affairs they left altogether to the 'spiritual lords,' the few greater magnates of the church who retained their places in the national council, and to such lay representatives as the clergy could assist in electing to the lower house.

There were left, therefore, in Parliament two main elements, lords and commoners. The lords, to whom the archbishops, bishops, and abbots adhered by immemorial wont, formed a house to themselves, the House of Lords. The commoners from the towns, who were soon joined by the middle order of gentry, the knights of the shires, who were neither great lords summoned by personal summons nor yet commoners, formed the other house, the House of Commons. These changes also were completed by the middle of the fourteenth century. Parliament was by that time, outwardly, just what it is now.

672. **The Privy Council.** — The Great Council and its direct heir, Parliament, were, of course, not a little jealous of the enormous powers wielded by the preferred counsellors of the king

whom he maintained in permanent relations of confidence with himself, and through whom he suffered to be exercised some of the greatest of the royal prerogatives. Especially did the arrangement seem obnoxious to those who wished to see the crown and its ministers restrained, when the vitality of the Permanent Council passed to a still smaller 'Privy' Council. This body was to the Permanent Council what the Permanent Council had been to the Great Council. It was still another "inner circle." It emerges during the reign of Henry VI. (1422–1461). The Permanent Council had become too large and unwieldy for the continuance of its intimate relations with the sovereign; it could no longer be used as a whole for purposes of *private* advice and resolution; and the king separated from the 'ordinary' councillors certain selected men whom he constituted his *Privy* Council, binding them to himself by special oaths of fidelity and secrecy. From that moment the Permanent Council is virtually superseded, and the Privy Council becomes the chief administrative and governing body of the realm.

673. **The Privy Council assumes Judicial Powers.** — Many of the judicial prerogatives which really belonged to the king when sitting in his Great Council, or Parliament, had been claimed for the king's Permanent Council: hence the distinct law courts which had been developed from its midst (sec. 666); and the same rights of exercising the powers of a court, which had been assumed by the Permanent Council, were in the later time arrogated to itself by the Permanent Council's proxy, the Privy Council. Out of it came, in course of time, the well-remembered Council of the North, the hated Star Chamber, and the odious High Commission Court, which were not abolished until 1641, when that great revolution had fairly set in, which was to crush arbitrary executive power forever in England, and to usher in the complete supremacy of Parliament.

674. **Origin of the Cabinet.** — Meanwhile, long before the parliamentary wars had come to a head, the same causes that

had produced the Permanent and Privy Councils had again asserted their strength and produced the *Cabinet*, still a third "inner circle," this time of the Privy Council; a small body selected for special confidence by the king from the general body of his counsellors, and meeting him, not in the larger council chamber, but in a 'cabinet,' or smaller room, apart. The Privy Council had, in its turn, become "too large for despatch and secrecy. The rank of Privy Councillor was often bestowed as an honorary distinction on persons to whom nothing was confided, and whose opinion was never asked. The Sovereign, on the most important occasions, resorted for advice to a small knot of leading ministers. The advantages and disadvantages of this course were early pointed out by Bacon, with his usual judgment and sagacity; but it was not till after the Restoration that the interior Council began to attract general notice. During many years old-fashioned politicians continued to regard the Cabinet as an unconstitutional and dangerous board. Nevertheless, it constantly became more and more important. It at length drew to itself the chief executive power, and has now been regarded during several generations as an essential part of our polity. Yet, strange to say, it still continues to be altogether unknown to the law. The names of the noblemen and gentlemen who compose it are never officially announced to the public; no record is kept of its meetings and resolutions; nor has its existence ever been recognized by any Act of Parliament."[1]

675. **The Development of the Cabinet.** — The Cabinet first comes distinctly into public view as a preferred candidate for the highest executive place in the reign of Charles II. It is now the central body of the English Constitution. The steps by which it approached its present position are thus summarized by a distinguished English writer:

"(1) First we find the Cabinet appearing in the shape of a

[1] Macaulay, *History of England*, Vol. I., pp. 197, 198 (Harper's ed. 1849).

small, informal, irregular *Camarilla*, selected at the pleasure of the Sovereign from the larger body of the Privy Council, consulted by and privately advising the Crown, but with no power to take any resolutions of State, or perform any act of government without the assent of the Privy Council, and not as yet even commonly known by its present name. This was its condition anterior to the reign of Charles I.

"(2) Then succeeds a second period, during which this Council of advice obtains its distinctive title of Cabinet, but without acquiring any recognized status, or *permanently* displacing the Privy Council from its position of *de facto* as well as *de jure*, the only authoritative body of advisers of the Crown. (Reign of Charles I. and Charles II., the latter of whom governed during a part of his reign by means of a Cabinet, and towards its close through a 'reconstructed' Privy Council.)

"(3) A third period, commencing with the formation by William III." of a ministry representing, not several parties, as often before, but the party predominant in the state, "the first ministry approaching the modern type. The Cabinet, though still remaining, as it remains to this day, unknown to the Constitution," had "now become *de facto*, though not *de jure*, the real and sole supreme consultative council and executive authority in the State." It was "still, however, regarded with jealousy, and the full realization of the modern theory of ministerial responsibility, by the admission of its members to a seat in Parliament," was "only by degrees effected.

"(4) Finally, towards the close of the eighteenth century, the political conception of the Cabinet as a body, — necessarily consisting (*a*) of members of the Legislature; (*b*) of the same political views, and chosen from the party possessing a majority in the House of Commons; (*c*) prosecuting a concerted policy; (*d*) under a common responsibility to be signified by collective resignation in the event of parliamentary censure; and (*e*) acknowledging a common subordination to one chief

minister, — took definite shape in our modern theory of the Constitution, and so remains to the present day."[1]

676. **Parliament and the Ministers.** — The principles concerning the composition of the modern Cabinets which are stated in this last paragraph of Mr. Traill's summary may be said to have been slowly developed out of the once changeful relations between Parliament and the ministers of the Crown. As I have said (sec. 672), the national council very early developed a profound jealousy of the power and influence of the small and private council, of state and court officials, which the king associated with himself in the exercise of his great prerogatives. By every means it sought to control the ministers. Abandoning very soon, as revolutionary, all efforts to hold the king himself responsible for executive acts, Parliament early accepted the theory that the king could do no wrong; the breaches of law and of right committed by the government were committed always, — so the theory ran, — by vicious advice of the king's personal advisers; they could do wrong (here the theory shaded off into fact), and they should be held responsible for all the wrong done. So early as the close of the twelfth century the Great Council deposed William Longchamp, Justiciar and Chancellor of Richard I., for abuse of power. During the fourteenth century Parliament claimed and once or twice exercised the right to appoint ministers and judges; it beheaded Edward II.'s Treasurer and imprisoned his Chancellor for their part in Edward's illegal acts; and at the close of the century (1386) it impeached Michael de la Pole, Richard II.'s minister, notwithstanding the fact that he was able to plead the king's direct commands in justification of what he had done. In the seventeenth century a new ground of impeachment was added. From that time out, ministers were held responsible, by the severe processes of trial by Parliament for high crimes and misdemeanors, not only for illegal, but also

[1] H. D. Traill, *Central Government* (English Citizen Series), pp. 23–25.

for bad advice to the Crown, for gross mistakes of policy as well as for overt breaches of law and of constitutional rights.

677. **Disappearance of Impeachment.** — The Act of Settlement and the policy of William and Mary inaugurated, however, the final period of Parliament's supremacy. Parliament's preferences began to be regarded habitually in the choice of ministers, and impeachment, consequently, began gradually to fall into complete disuse. Its place was taken by parliamentary votes, — finally by votes of the House of Commons alone. Ministers, who cannot command a majority in the House of Commons for the measures which they propose, resign, and Parliament has its own way concerning the conduct of the government.

678. **The Executive.** — The Executive, under the English system, so far as it may be described at once briefly and correctly, may be said to consist of the Sovereign and a Cabinet of ministers appointed with the Sovereign's formal consent. All real authority is with the Cabinet; but the ministers are, in law, only the Sovereign's advisers, and the government is conducted in the Sovereign's name. The true place of the Sovereign in the system is that of an honored and influential hereditary councillor, to whose advice an exalted title and a constant familiarity with the greater affairs of state lend a peculiar weight. The king[1] is in fact, though of course not in legal theory, a permanent minister, differing from the other ministers chiefly in not being responsible to Parliament for his acts, and on that account less powerful than they.

679. The Sovereign is not a member of the Cabinet because George I. could not speak English. Until the accession of George I. the king always attended Cabinet councils; George did not do so because he could not either understand or be understood in the discussions of the ministers. Since his time, therefore, the Sovereign has not sat with

[1] Since the throne of England is generally occupied by a man, it is most convenient to use 'king' as the distinctive title of the Sovereign in every general statement of constitutional principles.

the Cabinet. A similar example of the interesting ease with which men of our race establish and observe precedents is to be found in the practice on the part of Presidents of the United States of sending written messages to Congress. Washington and John Adams addressed Congress in person on public affairs; but Jefferson, the third President, was not an easy speaker, and preferred to send a written message. Subsequent Presidents followed his example as of course. Hence a binding rule of constitutional action.

680. **Position of the Cabinet.** — The Cabinet consists of the principal ministers of state and has reached its present position of power in the government because of its responsibility to Parliament. The chief interest of English constitutional history centres in the struggle of Parliament to establish its supremacy over all other authorities in the conduct of the government; that struggle issued in the last century in the complete triumph of Parliament; it has reached its farthest logical consequence in our own century in the concentration of parliamentary authority in the popular house of Parliament, the House of Commons. Parliament always claimed the right to direct in the name of the people, of the nation; that was the solid basis of all its pretensions ; and so soon as reforms in the composition of the House of Commons had made it truly representative of the people, the House of Lords, which represents only a single class of the people, necessarily sank to a subordinate place.

681. **Appointment of the Cabinet Ministers.** — The responsibility of the ministers to Parliament constitutes their strength because it makes them the agents of Parliament: and the agents of a sovereign authority virtually share its sovereignty. The king appoints only such ministers as have the confidence of the House of Commons; and he does it in this way: he sends for the recognized leader of the political party which has the majority in the House of Commons and asks him to form a Cabinet. If this leader thinks that his party will approve of his assuming such a responsibility, he accepts the commission,

and, usually after due consultation with other prominent members of his party, gives to the Sovereign a list of the men whom he recommends for appointment to the chief offices of state. These the Sovereign appoints and commissions as of course. They are always men chosen from among the members of both houses of Parliament, and generally because they have proved there their ability to lead. They have, so to say, chosen themselves by a career of steady success in the debates of the houses: they have come to the front by their own efforts, by force of their own ability, and represent, usually, tried parliamentary capacity. Such capacity is necessary for their success as ministers; for, after they have entered the Cabinet, they constitute, in effect, a committee of the majority of the House of Commons, commissioned to lead Parliament in debate and legislation, to keep it, — and, through it, of course the country at large, — informed concerning all important affairs of state which can prudently be made public, and to carry out in the conduct of the government the policy approved of by the representatives of the people.

682. **Composition of the Cabinet.** — The Cabinet does not consist invariably of the same number of ministers. Eleven officials always have seats in it; namely, the First Lord of the Treasury, the Lord Chancellor, the Lord President of the Council, the Lord Privy Seal, the Chancellor of the Exchequer, the five Secretaries of State (for Home Affairs, for Foreign Affairs, for the Colonies, for India, and for War), and the First Lord of the Admiralty. To these are generally added from three to five others, according to circumstances: often, for instance, the President of the Board of Trade, sometimes the Chief Secretary for Ireland, frequently the President of the Local Government Board. The general rule which governs these additions is, that every interest which is likely to be prominent in the debates and proceedings of the House of Commons ought to have a Cabinet minister to speak for it and to offer to the House responsible advice.

683. No member of the House of Commons may accept office without the approval of his constituents. Upon receiving an appointment as minister he must resign his seat in the House and seek re-election, as representative *plus* minister. The whole matter is merely formal,

however, in most cases. The opposite party do not usually, under such circumstances, contest the seat a second time, and the minister is re-elected without opposition.

684. The custom of the Sovereign's selecting only the chief minister and intrusting him with the formation of a ministry also, as well as the Sovereign's absence from Cabinet meetings, originated with George I., who did not know enough of English public men to choose all the ministers, and so left the choice to Walpole.

685. This method of forming a ministry is, of course, the outcome of Parliament's efforts to hold the king's ministers to a strict responsibility to itself. None but members of their own party would suit the majority in Parliament as ministers; and since the ministers had to explain and excuse their policy to the houses it was best that they should be members of the houses with the full privileges of the floor. Only by such an arrangement could the full harmony desired between Parliament and the ministers be maintained: by face to face intercourse.

686. **Ministerial Responsibility.** — If the ministers are defeated on any important measure in the House of Commons, or if any vote of censure is passed upon them in that House, they must resign, — such is the command of precedent, — and another ministry must be formed which is in accord with the new majority. The ministers must resign together because the best form of responsibility for their conduct of the government can be secured only when their measures are taken in concert, and the House of Commons would be cheated of all real control of them if they could, upon each utterance of its condemnation of an executive act, or upon each rejection by it of a measure proposed or supported by them, 'throw overboard' only those of their number whose departments were most particularly affected by the vote, and so keep substantially the same body of men in office. If a defeated or censured ministry think that the House of Commons in its adverse vote has not really spoken the opinion of the constituencies, they can advise the sovereign to dissolve the House and order

a new election; that advice must be taken by the Sovereign; and the ministers stand or fall according to the disposition of the new House towards them.

687. It should be added that exceptional cases do sometimes arise in which responsibility for an objectionable course of action can be so plainly and directly fixed upon a particular minister, who has acted, it may be, without the concurrence, possibly without the knowledge, of his colleagues, that his separate dismissal from office is recognized as the only proper remedy. A notable instance of this sort arose in England in 1851, when Lord Palmerston, then foreign secretary, was dismissed from office for adding to various other acts of too great independence of the concurrence of his colleagues or the crown an unauthorized expression of approval of the *coup d'état* of Louis Napoleon in France.

688. **Legal Status of the Cabinet.** — The peculiar historical origin of the Cabinet appears in a statement of its position before the law. As we have seen (sec. 674), it is not a body recognized by law; its existence, like the existence of not a few other political institutions in England, is only *customary*. The particular ministers who form the Cabinet have the right to be the exclusive advisers of the Crown, — that is, the only executive power, — only by virtue of their membership of the Privy Council. They must all be sworn into the membership of that body before they can act as ministers, as confidential servants of the Sovereign. The Privy Council itself, however (as a whole, that is), has not been asked for political advice for two centuries. It takes no part whatever in the function which twelve or fifteen ministers exercise by virtue of belonging to it; it is not responsible, of course, for the advice they give; and it cannot in any way control that advice.

689. **Initiative of the Cabinet in Legislation.** — Having inherited the right of initiative in legislation which once belonged to the Crown, the Cabinet shape and direct the business of the houses. Most of the time of Parliament is occupied by the consideration of measures which they have prepared and introduced; at every step in the procedure of the houses it is the duty of the ministers to guide and facilitate business.

690. **The Prime Minister.** — "Consistency in policy and vigor in administration" on the part of the Cabinet are obtained by its organization under the authority of one 'First' Minister. This Prime Minister generally holds the office of First Lord of the Treasury. It is not the

office, however, which gives him primacy in the Cabinet, but his recognized weight as leader of his party. The leader chosen by the Sovereign to form the ministry stands at its head when formed. He usually chooses to occupy the office of First Lord of the Treasury because the official duties of that place are nominal only and leave him free to exercise his important functions as leader of the party in power.

691. **The Departments of Administration.** — So much for the relations of the Cabinet to the Sovereign and to Parliament. When we turn to view it in its administrative and governing capacity as the English Executive, we see the ministers as heads of departments, as in other governments. But the departments of the central government in England are by no means susceptible of brief and simple description as are those of other countries, which have been given their present forms by logical and self-consistent written constitutions, or by the systematizing initiative of absolute monarchs. They hide a thousand intricacies born of that composite development so characteristic of English institutions.

692. **The Five Great 'Offices' of State.** — Not attempting detail, however, it is possible to give a tolerably clear outline of the central administration of the kingdom in comparatively few words. The Treasury I shall describe in a separate paragraph (sec. 696). The *Home Office* superintends the constabulary, oversees, to a limited extent, the local magistracy and the administration of prisons; advises the Sovereign with reference to the granting of pardons; and is the instrument of Parliament in carrying out certain statutes restricting at some points the employment of labor. The *Foreign Office* describes itself. So do also, sufficiently, the *Colonial Office*, the *War Office*, and the *India Office*.

693. These five great 'Offices' are all, historically considered, in a certain sense offshoots from a single office, that of the king's Principal Secretary of State. By one of the usual processes of English constitutional development, an officer bearing this title very early came into existence as one of the most trusted ministers of the Crown. At first only a specially confided-in servant of the Sovereign, employed on all

sorts of confidential missions, he gradually assumed a more regular official place and began to absorb various important functions. At length it became necessary to double him and to have two Principal Secretaries of State, two men theoretically sharing one and the same office, and alternates of each other. Now he has, to meet the exigencies of the case, been *quintupled*. There are five Principal Secretaries of State, all, in theory, holding the same office, and each, in theory, legally authorized to perform the functions of any or all of the others; but in fact, of course, keeping each to a distinct department. There is, then, a Principal Secretary of State for the Home Department, a Principal Secretary of State for Foreign Affairs, a Principal Secretary of State for the Colonies, a Principal Secretary of State for War, and a Principal Secretary of State for India. It is an interesting and characteristic case of evolution.

694. **The Admiralty, the Board of Trade, and the Local Government Board.** — The Admiralty is, of course, the naval office. It is presided over by a Commission of six, consisting of a chairman, entitled First Lord of the Admiralty, and five Junior Lords. *The Board of Trade* is, in form, a committee of the Privy Council. It is reconstituted at the opening of each reign by an order in Council. It consists, nominally, of "a President and certain *ex officio* members, including the First Lord of the Treasury, the Chancellor of the Exchequer, the Principal Secretaries of State, the Speaker of the House of Commons, and the Archbishop of Canterbury."[1] But it has long since lost all vital connection with the Privy Council and all the forms even of board action. Its President is now practically itself. Its duties and privileges are both extensive and important. It advises the other departments concerning all commercial matters, and is the statistical bureau of the kingdom; it exercises the state oversight of railways, inspects passenger steamers and merchant vessels, examines and commissions masters and mates for the merchant marine, administers the statutes concerning harbors, lighthouses, and pilotage, provides standard weights and measures, superintends the

[1] Traill, pp. 126, 127.

coinage, and supervises the Post Office. *The Local Government Board*, which is also in form a committee of the Privy Council, has also in reality none of the characteristics either of a committee or of a board. It is a separate and quite independent department, under the control of a President. Its other, nominal, members, the Lord President of the Council, the five Principal Secretaries of State, the Lord Privy Seal, and the Chancellor of the Exchequer, in reality take no part in its management. It is, in effect, the English department of the Interior. It is charged with supervising the administration, by the local authorities of the kingdom, "of the laws relating to the public health, the relief of the poor, and local government," — duties more important to the daily good government of the country than those of any other department. It also specially examines and reports upon every private bill affecting private interests.

695. **The Post Office** is in England a subdivision of the Board of Trade. At its head is a Postmaster General. It controls, besides the usual business of a post-office department, the telegraph system of the country, which is owned by the government, and has also under its direction a useful postal savings-bank system.

696. **The Treasury.** — The history of this department, which may be reckoned the most important, may serve as a type of English departmental evolution. Originally the chief financial minister of the Crown was the Lord High Treasurer, with whom was associated at an early date a Chancellor of the Exchequer. But in the reign of George I. the great office of Lord High Treasurer was, in English phrase, put permanently 'into commission': its duties, that is, were intrusted to a board instead of to a single individual. This board was known as the "Lords Commissioners for executing the office of Lord High Treasurer," and consisted of a First Lord of the Treasury, the Chancellor of the Exchequer, and three others known as Junior Lords. Evolution speedily set in, as in other similar English boards. That is, the board ceased to act as a board.

Its functions became concentrated in the hands of the Chancellor of the Exchequer; the First Lordship, occupied almost invariably since 1762 by the Prime Minister, gradually lost all connection, except that of honorary chairmanship, with the Treasury Commission, its occupant giving all his energies to his political functions (sec. 690); and the Junior Lords were left none but parliamentary duties.

697. **The Chancellor of the Exchequer,** then, is the working head of the Treasury Department, and as such plays one of the most conspicuous and important rôles in the government of the country. He controls the revenue and expenditure of the state, submitting to Parliament, in the form of an annual 'budget,' careful comparisons of the sums needed for the public service and of the sums that may be expected to accrue from existing or possible sources of revenue, together with proposals to extend or curtail taxation according as there is prospect of a deficit or of a surplus under existing arrangements.

698. **The Estimates.** — The various departments make up their own estimates; but these are subjected to a careful examination by the Chancellor of the Exchequer, and with him rests the prerogative of revising them where they may seem to admit of or require revision. Thus changes in the clerical forces of the departments or re-distribution of their work among sub-departments, etc., cannot, if they involve additional expense, be made without express approval by the Treasury.

Mr. Gladstone twice, with characteristic energy, held, when Prime Minister, both the office of First Lord of the Treasury and that of Chancellor of the Exchequer, thus in effect once more bringing the First Lord into vital connection with his nominal department.

699. **Administrative Departments of the Privy Council.** —Though superseded as advisory council to the Crown by the Cabinet and deprived of almost all executive control by the virtual erection of its several boards into independent departments, the Privy Council still has one or two vital parts. Chief among these are (1) *The Education Department,* which consists of the Lord President of the Council, as nominal

chief, a Vice-President as working chief, and certain *ex officio* members, among them the Chancellor of the Exchequer and the Secretary of State for Home Affairs, and which is charged with the administration of the public educational system of the country; and (2) *The Agricultural Department*, to which is intrusted the enforcement of the 'Contagious Diseases (Animals) Acts' of 1878–1886, as well as sundry other powers. Both of these are veritable departments of the Privy Council and preserve in a rather more than formal way their collegiate character. The important judicial duties of the Council I shall speak of in another connection (sec. 736).

700. **Other Executive Offices.** — Subordinate to the Treasury department, but in reality possessing a quite distinct individuality of its own, is the *Office of Public Works and Buildings*, which is charged with the "custody and supervision of the royal palaces and public parks, and of all public buildings not specially assigned to the care of other departments."[1] It is composed nominally of a First Commissioner, the Principal Secretaries of State, and the President of the Board of Trade, but is controlled in fact by the First Commissioner and his permanent assistants, the First Commissioner representing it in Parliament.

701. **The Lord Privy Seal** exercises no important functions except those of keeping the great Seal of State and affixing it to such public documents as need its formal attestation; but the office is a 'Cabinet office.' The lightness of its duties leaves its incumbent the freer for his Cabinet functions of counsel. It is a berth for elderly men of mental and political weight who cannot or will not undertake onerous official duties.

702. **The Chancellor of the Duchy of Lancaster** holds an office whose duties (entirely legal and local) have all been delegated by long-standing habit to a Vice-Chancellor; but eminent politicians are often brought into the Cabinet through this sinecure Chancellorship in order that they may give the ministry the benefit of their advice and countenance.

703. **Political Under Secretaries.** — There are often associated with the principal ministers of state certain 'political' Under Secretaries, whose function is one of very considerable importance. A political Under Secretary is one who goes in or out of office with his party,

[1] Traill, p. 152.

not having a place in the cabinet but sharing its fortunes in the Commons. He is parliamentary spokesman for his chief. If the foreign minister, for instance, or any other member of the Cabinet, the affairs of whose department may be expected to call forth frequent comment or question in the lower House, be a member of the House of Lords, he is represented in the Commons by an Under Secretary, who there speaks as the minister's proxy. The representation of the ministers in both Houses is thus secured.

704. **Administration of Scotland and Ireland.** — The affairs of Scotland are cared for through the agency of a Lord Advocate for Scotland, who is the legal adviser of the government concerning Scotch interests, and a Secretary for Scotland who is the intermediary between the Scotch members of Parliament and the ministry, and the official spokesman of the ministers regarding Scotch business in the House of Commons. Officially the Lord Advocate ranks as a subordinate of the Secretary of State for Home Affairs. The Irish executive is, formally at least, separate from the English, being vested in a Lord Lieutenant and Privy Council; but in fact it is completely controlled by the English Cabinet through the *Chief Secretary to the Lord Lieutenant*, who is always a member of the House of Commons and, when Irish affairs are specially prominent, a member of the Cabinet also; and who, though in titular rank a subordinate of the Lord Lieutenant, is, by virtue of his relations to the Cabinet and to Parliament, in effect his master.

705. **The Lord Chancellor**, the only regular member of the Cabinet whose duties I have not yet indicated, is a judicial and legislative officer. His functions will be mentioned in other connections (sec. 737).

706. **The Cabinet as Executive.** — It would be a great mistake to suppose that, because the Cabinet is in reality a committee of the House of Commons, drawing all its authority from the confidence reposed in it by that chamber, it is a *mere* committee possessing no separate importance as the executive body of the kingdom. In a sense the ministers have inherited the ancient prerogatives of the Crown; and Parliament is, to a

very sensible degree, dependent upon them for the efficacy of the part it is to play in governing. Almost all important legislation waits for their initiative, and the whole business of the Houses to a great extent depends upon them for its progress. They can make treaties, of whatever importance, with foreign countries; they can shape the policy of the mother country towards her colonies; they can take what serious steps they will with reference to the government of India, can move troops and naval forces at pleasure, can make a score of momentous moves of policy towards the English dependencies and towards foreign countries, — in the field, that is, of many of the largest interests of the Empire, — which may commit the country to the gravest courses of action; — and all without any *previous* consultation with Parliament, whom they serve. The House of Commons, in brief, can punish but cannot prevent them.

707. **Parliament: I. The House of Commons; its Original Character.** — "The Parliament of the nineteenth century is, in ordinary speech, the House of Commons. When a minister consults Parliament he consults the House of Commons; when the Queen dissolves Parliament she dissolves the House of Commons. A new Parliament is merely a new House of Commons."[1] Such has been the evolution of English politics. But the processes which worked out this result were almost five centuries long. During a very long period, Parliament's first and formative period, the Commons held a position of distinct and, so to say, legitimate subordination to the Lords, lay and spiritual; the great constitutional rôles were played by the king and baronage. The commoners in Parliament represented the towns, and spoke, for the most part, at first, only concerning the taxes they would give. When the house of Parliament called the House of Commons first assumed a distinct separate existence, about the middle of the fourteenth century (sec. 671), it was by no means a homogeneous body.

[1] Spencer Walpole, *The Electorate and the Legislature* (English Citizen Series), p. 48.

It held both the knights of the shires and the burgesses of the towns; and it was a very long time before the knights forgot the doubt which had at first been felt as to which house they should sit with, Lords or Commons. They were men of consideration in their counties; the only thing in common between them and the men from the towns was that election, and not hereditary possessions or rank, was the ground of their presence in Parliament. Long use, however, finally obscured such differences between the two groups of members in the lower house; their interests were soon felt to be common interests: for the chief questions they had a real voice in deciding were questions of taxation, which touched all alike.

708. **Historical Contrasts between County and Borough Representatives.** — The main object of the Crown in making the Commons as representative as possible would seem to have been to bring the whole nation, as nearly as might be, into cooperation in support of the king's government: and at first the lower house was a truly representative body. The knights of the shires were elected "in the county court, by the common assent of the whole country"; the burgesses of the towns were chosen by the borough freemen, a body numerous or limited according to the charter of each individual town, but generally sufficiently broad to include the better class of citizens. It was the decay of the towns and the narrowing of their franchises which made the Commons of the first decades of our own century the scandalously subservient, unrepresentative Commons which had driven the American colonies into revolt. So early as the reign of Henry VI., in the first half, that is, of the fifteenth century, the franchise was limited in the counties to freeholders whose landed property was of an annual value of forty shillings, and forty shilling freeholders were then men of means;[1] but this franchise remained unchanged until the parliamentary reforms of the present century, and tended steadily,

[1] Forty shillings, it is estimated, were equivalent at that time in purchasing value to forty pounds at present ($200).

with the advancing wealth of the country, and the relative decrease in the value of the shilling, to become more liberal, more inclusive. The borough franchise, on the contrary, went all the time steadily from bad to worse. It became more and more restricted, and the towns which sent representatives to Parliament became, partly by reason of their own decay, partly by reason of the growth and new distribution of population in the kingdom, less and less fitted or entitled to represent urban England. New boroughs were given representatives from time to time; but all efforts to redistribute representation had virtually ceased before the dawn of the period of that great increase of population and that immense development of wealth and industry which has made modern England what it is. The towns which returned members to the House of Commons were mostly in the southern counties where the old centres of population had been. Gradually they lost importance as the weight of the nation shifted to the central and western counties and Liverpool, Manchester, and Birmingham grew up, — and not their importance only, but their inhabitants as well. Some fell into ruins and merged in neighboring properties, whose owners pocketed both them and their parliamentary franchise; others, which did not so literally decay, became equally subject to the influence of neighbor magnates upon whom the voters felt more or less dependent; and at last the majority of seats in the Commons were virtually owned by the classes represented in the House of Lords.

The House of Commons consisted in 1801 of 658 members, and of these 425 are said to have been returned "on the nomination or on the recommendation of 252 patrons." It is said, also, that "309 out of the 513 members belonging to England and Wales owed their election to the nomination either of the Treasury or of 162 powerful individuals."[1]

709. **Geographical Relations of Boroughs and Counties.** — Of course borough populations had no part in the election of county members. The counties represented in Parliament were rural areas,

[1] Walpole, p. 55.

exclusive of the towns. Thus the county of Derby was, for the purposes of parliamentary representation, the county of Derby *minus* its boroughs.

710. **Parliamentary Reform.** — It was to remedy this state of things that the well-known reforms of the present century were undertaken. Those reforms have made the House of Commons truly representative and national: and in making it national have made it dominant. In 1832 there was made a wholesale redistribution of seats and a complete reformation of the franchise. The decayed towns were deprived of their members, and the new centres of population were accorded adequate representation. The right to vote in the counties was extended from those who owned freeholds to those who held property on lease and those who held copyhold estates,[1] and to tenants whose holdings were of the clear annual value of fifty pounds. The borough franchise was put upon the uniform basis of householders whose houses were worth not less than ten pounds a year. This was putting representation into the hands of the middle, well-to-do classes; and with them it remained until 1867. In 1867 another redistribution of seats was effected, which increased the number of Scotch members from fifty-four to sixty and made other important readjustments of representation. The franchise was at the same time very greatly widened. In the boroughs all householders and every lodger whose lodgings cost him ten pounds annually were given the right to vote; and in the counties, besides every forty shilling freeholder, every copyholder and leaseholder whose holding was of the annual value of five pounds, and every householder whose rent was not less than twelve pounds a year. Thus representation stood for almost twenty years. Finally, in 1884, the basis of the present franchise was laid. The qualifications for voters in the counties

[1] Copyhold estates are estates held by the custom of the manor in which they lie, a custom evidenced by a 'copy' of the rolls of the Manor Court.

were made the same as the qualifications fixed for borough electors by the law of 1867, and over two millions and a half of voters were thus added to the active citizenship of the country. There is now a uniform 'household and lodger franchise' throughout the kingdom.

711. 'Occupier' is used in England as synonymous with the word lodger. The 'occupation' requisite for the exercise of the franchise must be of a "clear annual value of £10." Occupation "by virtue of any office, service, or employment," is considered, for the purpose of the franchise, equivalent to occupation for which rent is paid, if the rent *would* come to the required amount, if charged.

712. In 1885 another great *Redistribution Act* was passed, which merged eighty-one English, two Scotch, and twenty-two Irish boroughs in the counties in which they lie, for purposes of representation; gave additional members to fourteen English, three Scotch, and two Irish boroughs; and created thirty-three new urban constituencies. The greater towns which returned several members were cut up into single-member districts, and a like arrangement was effected in the counties, which were divided into electoral districts to each of which a single representative was assigned.[1] These changes were accompanied by an increase of twelve in the total number of members. Through the redistribution of seats in 1832 and 1867 the number had remained 658; it is now 670.

713. The following is an analysis of the present membership of the House of Commons given in the Statesman's Year Book for 1887:[2] the English counties return 253 members, the English boroughs 237, the English universities 5; Scotch counties 39, boroughs 31, universities 2; Irish counties 85, boroughs 16, universities 2. Totals: counties 377, boroughs 284, universities 9.

714. One signal feature of the reforms of 1884–85 was that they applied to Scotland and Ireland as well as to England and Wales. Earlier Acts had applied only to England and Wales, special Acts

[1] This was establishing what the French, as we have seen (sec. 315), would call *scrutin d'arrondissement*.

[2] Where other data also will be found.

governing the franchise and representation in Ireland and Scotland. The Irish delegation in the House of Commons is now for the first time truly representative of the Irish people.

715. The legislation of 1885, by dividing the greater town into single member constituencies, abolished the 'three-cornered constituencies' which had been devised in 1867 for purposes of minority representation. Voters in places which returned more than two members were allowed one vote less apiece in parliamentary elections than the number of members to be chosen. Thus, if any place returned four members, for example, each voter was entitled to vote for three and no more: it being hoped that the minority would by proper management under this plan be able to elect one out of the four. The plan was not found to work well in practice, and has accordingly been abandoned.

716. **Election and Term of the Commons.** — Members of the House of Commons are elected, by secret ballot, for a term of seven years. Any full citizen is eligible for election except priests and deacons of the Church of England, ministers of the Church of Scotland, Roman Catholic priests, and sheriffs and other returning officers, — and except also, English and Scotch peers. Irish peers are eligible and have often sat in the House.[1] The persons thus excepted, — all save the peers, at least, — can neither sit nor vote.

717. As a matter of fact no House of Commons has ever lived its full term of seven years. A dissolution, for the purpose of a fresh appeal to the constituencies, has always cut it off before its statutory time. The average duration of Parliaments has been less than four years. The longest Parliament of the present century (elected in 1820) lived six years, one month, and nine days.

718. The use of the secret ballot does not rest upon any permanent statute. In 1872 its use was voted for one year; and ever since the provision has been annually renewed.

719. There is no property qualification for election to the House now, as there was formerly; but the members receive no pay for their services; and, unless their constituents undertake to support them, — as was done in the early history of Parliament, and has been done again in some recent instances, — this fact constitutes a virtual income qualification.

[1] Lord Palmerston, for example, was an Irish peer.

720. **Summons, Electoral Writ, Prorogation.** — No standing statutes govern the time for electing Parliaments. Parliament assembles upon summons from the Crown (which, like all other acts of the Sovereign, now really emanates from the ministers); and the time for electing members is set by writs addressed to the sheriffs, as of old (sec. 667). Parliament is also 'prorogued,' (adjourned for the session) by the Sovereign (that is, the Cabinet); and assembled again, after recess, by special summons.

721. The summons for a new Parliament must be issued at least thirty-five days before the day set for its assembling; the summons to a prorogued Parliament at least fourteen days beforehand. It is now the invariable custom to assemble Parliament once every year about the middle of February, and to keep it in session from that time till about the middle of August.

722. If a seat fall vacant during a session, a writ is issued for an election to fill it upon motion of the House itself; if a vacancy occur during a recess, the writ is issued at the instance of the Speaker of the House.

723. Since 1867 the duration of Parliament has not been liable to be affected by a demise of the Crown; before 1695 Parliament died with the monarch. In that year it was enacted that Parliament should last for six months after the demise of the Crown, if not sooner dissolved by the new Sovereign. Parliament, it is now provided, must assemble immediately upon the death of the Sovereign. If the Sovereign's death take place after a dissolution and before the day fixed for the convening of the new Parliament, the old Parliament is to come together for six months, if necessary, but for no longer term.

724. **Organization of the House.** — The Commons elect their own Speaker (Spokesman) and other officers. The business of the House is, as we have seen (sec. 689), quite absolutely under the direction of its great committee, the Ministry. Certain days of the week are set apart by the rules for the consideration of measures introduced by private members, but most of the time of the House is devoted to 'government bills.' The ma[illegible] in the hands of their party leade[illegible]reat contests of the

session are between the minority on one side of the chamber and the ministerial party, or majority, on the other side.

725. Down the centre of the hall in which the House sits runs a very broad aisle. The Speaker's seat stands, upon an elevated place, at the further end of this aisle, below it the seats and tables of the clerks and a great table stretching some distance down the aisle, for the reception of the Sergeant's mace and various books, petition boxes, and papers. The benches on either side of the aisle face each other. Those which rise, in tiers, to the Speaker's right are occupied by the majority, the ministers, their leaders, sitting on the front bench by the great table. This front bench is accordingly called the 'Treasury Bench,' — the Treasury being the leading Cabinet office. On the benches which rise to the Speaker's left sit the minority, their leaders also (the 'leaders of the Opposition,' — the minority being expected, generally with reason, to be opposed to all ministerial proposals) on the front bench by the table, and so directly facing the ministers, only the table and the aisle intervening.

726. **II. The House of Lords: Its Composition.** — The House of Lords consisted during the session of 1888 of four hundred and seventy-six English hereditary peers (Dukes, Marquises, Earls, Viscounts, Barons); the two archbishops and twenty-four bishops, holding their seats by virtue of their offices; sixteen Scottish representative peers elected by the whole body of Scotch peers, of whom there are eighty-five, to sit for the term of Parliament; twenty-eight Irish peers elected by the peers of Ireland, of whom there are one hundred and seventy-seven, to sit for life; and three judicial members known as Lords of Appeal in Ordinary (secs. 728, 735, 736), sitting, as life-peers only, by virtue of their office.

There is no necessary limitation to the number of hereditary English peers. Peers can be created at will by the Crown (that is, by the ministry), and their creation is in fact frequent. Two-thirds of the present number of peers hold peerages created in the present century. Thirteen were created in the year 1886.

The number of Scotch and Irish peers is limited by statute.

The House of Lords is summoned to its sessions when the House of Commons is and the two must always be summoned together.

727. **Function of the House of Lords in Legislation.** — The House of Lords is, in legal theory, coequal in all respects with the House of Commons; but, in fact, its authority is, as I have already more than once said (secs. 677, 686, 707), very inferior. Its consent is as necessary as that of the House of Commons to every act of legislation; but it is not suffered to withhold that consent when the House of Commons speaks emphatically and with the apparent concurrence of the nation on any matter: it is then a matter of imperative policy with it to acquiesce. Its legislative function has been well summed up as a function of cautious revision. It can stand fast against the Commons only when there is some doubt as to the will of the people.

728. **The House of Lords as a Supreme Court.** —The House of Lords is still, however, in fact as well as in form, the supreme court of appeal in England, though it has long since ceased to exercise its judicial functions (inherited from the Great Council of Norman times) as a body. Those functions are now always exercised by the Lord Chancellor, who is *ex-officio* president of the House of Lords, and three Lords of Appeal in Ordinary, who are learned judges appointed as life-peers, specially to perform this duty. These special 'Law Lords' are assisted from time to time by other lords who have served as judges of the higher courts or who are specially learned in the law.

729. **Legislation,** therefore, is controlled by the House of Commons, the interpretation of the law by the judicial members of the House of Lords. The House of Lords shares with the popular chamber the right of law-making, but cannot assert that right in the face of a pronounced public opinion. The Sovereign has the right to negative legislation; but the Sovereign is in the hands of the ministers, and the ministers are in the hands of the Commons; and legislation is never negatived.

730. **The Constitution of England** consists of law and precedent. She has great documents like Magna Ch

foundation of her institutions; but Magna Charta was only a royal ordinance. She has great laws like the Bill of Rights at the centre of her political system; but the Bill of Rights was only an act of Parliament. She has no written constitution, and Parliament may, in theory, change the whole structure and principle of her institutions by mere Bill. But in fact Parliament dare not go faster than public opinion: and public opinion in England is steadily and powerfully conservative.

That is a very impressive tribute which Sir Erskine May feels able soberly to pay to the conservatism of a people living under such a form of government when he says, "Not a measure has been forced upon Parliament which the calm judgment of a later time has not since approved; not an agitation has failed which posterity has not condemned."[1]

731. **The Courts of Law.** — The administration of justice has always been greatly centralized in England. From a very early day judges of the king's courts have 'gone on circuit,' holding their assizes (sittings) in various parts of the country, in order to save suitors the vexation and expense of haling their adversaries always before the courts in London. But these circuit judges travelled from place to place under special commissions from the central authorities of the state, and had no permanent connections with the counties in which their assizes were held: they came out from London, were controlled from London, and, their circuit work done, returned to London. It was, moreover, generally only the three courts of Common Law (the Court of King's Bench, the Court of Common Pleas, and the Court of Exchequer) that sent their judges on circuit; the great, overshadowing Court of Chancery, which arrogated so wide a jurisdiction to itself, drew all its suitors to its own chambers in Westminster. The only thing lacking to perfect the centralization was uniformity of organization and a less haphazard distribution of jurisdiction among the various courts. This lack was supplied by a great Judicature Act passed in

[1] *Constitutional History*, Vol. II., p. 243 (Am. ed., 1863).

1873. By that Act (which went into force on the 1st November, 1875), and subsequent additional legislation extending to 1877, the courts of law, which had grown, as we have seen (sec. 666), out of that once single body, the ancient Permanent Council of the Norman and Plantagenet kings, were at last reintegrated, made up together into a co-ordinated whole.

732. **Judicial Reform: the Reorganization of 1873–77.** — These measures of reorganization and unification had been preceded, in 1846, by a certain degree of decentralization. Certain so-called County Courts were then created, which are local, not peripatetic Westminster, tribunals, and which have to a very considerable extent absorbed the assize business, though their function, theoretically, is only to assist, not to supplant, the assizes. Now, therefore, the general outlines of the judicial system are these. The general courts of the kingdom are combined under the name, Supreme Court of Judicature. This court is divided into two parts, which are really two quite distinct courts; namely, the High Court of Justice and the Court of Appeal. Over all, as court of last resort, still stands the House of Lords. The High Court of Justice acts in three divisions, a Chancery Division, a Queen's Bench Division, and a Probate, Divorce, and Admiralty Division; and these three divisions constitute the ordinary courts of law, inheriting the jurisdictions suggested by their names. From them an appeal lies to the Court of Appeal; from the Court of Appeal to the House of Lords. The County Courts stand related to the system as the Assizes do.

733. "**The Chancery Division** has five judges besides its president, the Chancellor; the Queen's Bench Division has fifteen judges, of whom one, the Lord Chief Justice, is its president; the Probate, Divorce, and Admiralty Division has but two judges, of whom one presides over the other."[1] This arrangement into divisions is a mere matter of convenience; no very strict distinctions as to jurisdiction are preserved; and any changes that the judges think de may be

[1] F. W. Maitland, *Justice and Poli*

made by an Order in Council. Thus an Exchequer Division and a Common Pleas division, which at first existed, in preservation of the old lines of organization, were abolished by such an Order in December, 1880. The judges assigned to the various Divisions do not necessarily or often sit together. Cases are generally heard before only one judge; so that the High Court may be said to have the effective capacity of twenty-three courts, its total number of judges being twenty-three. Only when hearing appeals from inferior tribunals, or discharging any other function different from the ordinary trial of cases, must two or more judges sit together.

734. **The Court of Appeals** may hear appeals on questions both of law and of fact. It consists of the Master of the Rolls and five Lords Justices, who may be said to constitute its permanent and separate bench, and of the presidents of the three Divisions of the High Court who may be called its occasional members. Three judges are necessary to exercise its powers, and, in practice, its six permanent members divide the work, holding the court in two independent sections.

735. **The House of Lords** may sit, when acting as a court, when Parliament is not in session, after a prorogation, that is, or even after a dissolution: for the House of Lords when sitting as a court is like its legislative self only in its modes of procedure. In all other respects it is totally unlike the body which obeys the House of Commons in law-making. It is constituted always, as a court, of the Lord Chancellor and at least two of the Lords of Appeal in Ordinary of whom I have spoken (sec. 726); only sometimes are there added to these a third Lord of Appeal in Ordinary, an ex-Lord Chancellor, or one or more of such judges or ex-judges of the higher courts as may have found their way to peerages. Other members never attend; or attending, never vote.

736. **A Judicial Committee of the Privy Council**, of which also the Lord Chancellor is a member, and which is presently to consist mainly of the same Lords of Appeal in Ordinary that act in judicial matters as the House of Lords, constitutes a court of last resort for India, the Colonies, the Channel Islands, and the Isle of Man.

737. **The Lord Chancellor** is the most notable officer in the whole system. He is president of the House of Lords, of the Court of Appeal, of the High Court of Justice, and of the Chancery Division of the High Court, and he is a member of the Judicial Committee of the Privy Council; and he actually sits in all of these except the High Court,— in the House of Lords and the Privy Council always, in the Court of Appeal often. More singular still, he is the political officer of the law: he is a member always of the Cabinet, and like the other member

belongs to a party and goes in or out of office according to the favor of the House of Commons, exercising while in office, in some sense, the functions of a Minister of Civil Justice.[1]

738. **Civil Cases** are heard either by judges of the High Court in London, by judges of that court sitting on circuit in the various 'assize towns' of the county, of which there is always at least one for each county, or by the new County Courts created in 1846, which differ from the old county courts, long since decayed and now deprived of all judicial functions, both in their organization and in their duties. They consist, not of the sheriff and all the freemen of the shire, but of single judges, holding their offices during good behavior, assisted by permanent ministerial officers, and exercising their jurisdiction not over counties but in districts much smaller than the counties. They are called county courts only by way of preserving an ancient and respected name.

739. **The County Courts** have jurisdiction in all cases of debt or damage where the sum claimed does not exceed £50, and in certain equity cases where not more than £500 is involved — except that cases of slander, libel, seduction, and breach of promise to marry, as well as all matrimonial cases are withheld from them. At least, such is their jurisdiction in rough outline. A full account would involve many details; for it has been the tendency of all recent judicial legislation in England to give more and more business, even of the most important kind, to these Courts. Their present importance may be judged from the fact, stated by Mr. Maitland, that "most of the contentious litigation in England is about smaller sums than" £50.

740. A judge of the High Court may send down to a county court, upon the application of either party, cases of contract in which the sum claimed does not exceed £100. Any case, however small the pecuniary claim involved, may be removed from the county to the High Court if the judge of the county court will certify that important principles of law are likely to arise in it, or if the High Court or any judge thereof deem it desirable that it should be removed. Appeals from a county court to the High Court are forbidden in most cases in which less than

[1] Maitland, p. 68.

741. The county court system rests upon the basis of a division of the country into fifty-six circuits. All but one or two of these include several 'districts' — the districts numbering about 501. Each district has its own separate court, with its own offices, registrar, etc.; but the judges are appointed for the circuits, — one for each circuit. They are appointed by the Lord Chancellor from barristers of seven years' standing.[1]

742. **Juries** are falling more and more into disuse in England in civil cases. In all the more important causes, outside the Chancery Division, whose rule of action, like that of the old Chancery Court, is 'no jury,' a jury may be impanelled at the desire of either party; but many litigants now prefer to do without, — especially in the County Courts, where both the facts and the law are in the vast majority of cases passed upon by the judge alone, without the assistance of the jury of five which might in these courts be summoned in all cases of above £20 value.

743. **Criminal Cases** are tried either before the county Justices of the Peace, who are unpaid officers appointed by the Chancellor upon the recommendation of the Lords Lieutenant of the Counties; before borough Justices, who are paid judges much like all others; or before judges of the High Court on circuit. The jurisdiction of the Justices may be said to include all but the gravest offences, all but those, namely, which are punishable by death or by penal servitude, and except, also, perjury, forgery, bribery, and libel. There are many Justices for each county, there being no legal limit to their number; and they exercise their more important functions at general Quarter Sessions, at general sessions, that is, held four times yearly. The criminal assizes of the High Court also are held four times a year. All criminal cases, except, of course, those of the pettiest character, such as police cases, are tried before juries.

"About one-half of the criminal trials," it is stated,[2] "take place at county sessions, about one-fourth at borough sessions, the rest at Assizes or the Central Criminal Court," the great criminal court of London.

[1] The various Acts affecting the county courts were amended and consolidated by the County Courts Act, 1888.

[2] Maitland, p. 86.

744. **Quarter and Petty Sessions.** — For the exercise of their more important judicial functions the Justices meet quarterly, in Quarter Sessions; but for minor duties in which it is not necessary for more than two Justices to join, there are numerous Petty Sessions held at various points in the counties. Each county is divided by its Quarter Sessions into *petty sessional districts*, and every neighborhood is given thus its own court of Petty Sessions, — from which in almost all cases an appeal lies to Quarter Sessions. Thus the important function of licensing (sec. 771) is exercised by Petty Sessions, subject to appeal to the whole bench of Justices.

745. **The Justices of the Peace** were, as we shall see more particularly in other connections (secs. 754–757), the general governmental authorities of the counties, until the reform of local government effected in 1888, exercising functions of the most various, multifarious, and influential sort. They are generally country gentlemen of high standing in their counties, and serve, as already stated, without pay. They are appointed, practically, for life. The 'Commission of the Peace,' — the commissioning, that is, of Justices of the Peace, — originated in the fourteenth century, and has had a long history of interesting development. Considering the somewhat autocratic nature of the office of Justice, it has been, on the whole, exercised with great wisdom and public spirit, and during most periods with extraordinary moderation, industry, and effectiveness.

746. The duties which Americans associate with the office of Justice of the Peace are exercised in England, not by the bench of Justices sitting in Quarter Sessions, — they then constitute, as we have seen, a criminal court of very extensive jurisdiction, — but by the Justices singly, sitting either formally or informally. A single Justice may conduct the preliminary examination of a person charged with crime, and may commit for trial if reasonable ground of suspicion be proved. A single Justice also can issue search warrants to the constabulary for the detection of crime, etc.

747. **Police.** — The police force, or, in more English phrase, the constabulary, of the kingdom is overseen from London by the Home Office, which makes all general rules as to its discipline, pay, etc., appoints royal inspectors, and determines, under the Treasury, the amount of state aid to be given to the support of the forces; but all the real administering of the system is done by the local authorities. In the Counties a

joint Committee of Quarter Sessions and the County Council appoint the Chief Constable, who appoints and governs the force with powers of summary dismissal and punishment, but who acts in all things subject to the governing control of the Committee. In those towns which undertake to maintain a force distinct from that of the County the Head Constable is chosen by the town authorities and the direction of the force is superintended by a 'Watch Committee' of the Town Council. London, which employs, it is stated, one-third of the entire police force of the kingdom, has been given a special, exceptional system of its own. The city police are governed by a Commissioner and two Assistant Commissioners who are appointed by the Home Secretary and serve directly under his authority.

The police throughout the country are given something like military drill and training, the organization being made as perfect, the training as thorough, and the discipline as effective as possible. Ex-army officers are preferred for the office of Chief Constable.

II. Local Government.

748. **Complex Character of Local Government in England.** — The subject of local government in England is one of extreme complexity and, therefore, for my present purpose of brief description, one of extreme difficulty. So perfectly unsystematic, indeed, are the provisions of English law in this field that most of the writers who have undertaken to expound them — even to English readers — have seemed to derive a certain zest from the despairful nature of their task — a sort of forlorn-hope enthusiasm. The institutions of local government in England have grown piece by piece as other English institutions have grown, and not according to any complete or logical plan of statutory construction. They are patch-work, not symmetrical net-work, and the patches are of all sizes and colors.

"For almost every new administrative function," complains one of the recent handbooks on the subject, "the Legislature has provided a new area containing a new constituency, who by a new method of election choose candidates who satisfy a new qualification, to sit upon a new board, during a new term, to levy a new rate [tax], and to spend a good deal of the new revenues in paying new officers and erecting new buildings."[1]

749. It has been the habit of English legislators, instead of perfecting, enlarging, or adapting old machinery, to create all sorts of new pieces of machinery with little or no regard to their fitness to be combined with the old or with each other. The Local Government Act of 1888 represents the first deliberate attempt at systematization; but even that Act does not effect system, and itself introduces additional elements of confusion by first adopting another Act (the Municipal Corporations Act of 1882) as its basis and then excepting particular provisions of that Act and itself substituting others in respect, not of all, but of some of the local administrative bodies meant to be governed by it. It would seem as logical a plan of description as any, therefore, to discuss the older divisions and instrumentalities first and then treat afterwards of more recent legislative creations as of modifications — of however haphazard a kind — of these.

750. **General Characterization.** — In general terms, then, it may be said, that throughout almost the whole of English history, only the very earliest periods being excepted, counties and towns have been principal units of local government; that the parishes into which the counties have been time out of mind divided, though at one time of very great importance as administrative centres, were in course of time in great part swallowed up by feudal jurisdictions, and now retain only a certain minor part in the function, once exclusively their own, of caring for the poor; and that [illegible] framework of counties, towns,

[1] *Local Administ* [illegible] ment Series), by Wm. Rathbone, Albert Pell, and

and parishes has, of late years, been extensively overlaid and in large part obscured: (*a*) by the combination (1834) of parishes into 'Unions' made up quite irrespective of county boundaries and charged not only with the immemorial parish duty of maintaining the poor but often with sanitary regulation also and school superintendence, and generally with a miscellany of other functions; (*b*) by the creation of new districts for the care of highways; and (*c*) by new varieties of town and semi-town government. The only distinction persistent enough to serve as a basis for any classification of the areas and functions of the local administration thus constructed is the distinction between Rural Administration and Urban Administration, — a distinction now in part destroyed by the Act of 1888; and of these two divisions of administration almost the only general remark which it seems safe to venture is, that Rural Administration has hitherto rested much more broadly than does Urban on old historical foundations.

751. **The County: Its Historical Rootage.** — For the County, with its influential Justices of the Peace and its wide administrative activities, is still the vital centre of rural government in England; and the Counties are in a sense older than the kingdom itself. Many of them, as we have seen (sec. 655), represent in their areas, though of course no longer in the nature of their government, separate Saxon kingdoms of the Heptarchy times. When they were united under a single throne they retained (it would appear) their one-time king and his descendants in the elder male line as their eoldormen. They retained also their old general council, in which eoldorman and bishop presided, though there was added presently to these presidents of the older order of things another official, of the new order, the king's officer, the Sheriff. To this council went up as was of old the wont, the priest, the reeve, and four picked men from every township, together with the customary delegates from the 'hundreds.'

Of course the Counties no longer retain these antique forms

of government; scarcely a vestige of them now remains. But the old forms gave way to the forms of the present by no sudden or violent changes, and some of the organs of county government now in existence could adduce plausible proof of their descent from the manly, vigorous, self-centred Saxon institutions of the ancient time.

752. **Early Evolution of the County Organs.** — In Norman times the eoldorman's office languished in the shadow of the Sheriff's great authority. The spiritual and temporal courts were separated, too, and the bishop withdrew in large measure from official participation in local political functions. The County Court became practically the Sheriff's Court; its suitors the freeholders. Its functions were, however, still considerable: it chose the officers who assessed the taxes, it was the medium of the Sheriff's military administration, and it was still the principal source of justice. But its duties were not slow to decay. As a Court it was speedily handed over to the king's itinerant justices, who held their assizes in it and heard all important cases: all 'pleas of the Crown.' Its financial functions became more and more exclusively the personal functions of the Sheriffs, who were commonly great barons, who managed in some instances to make their office hereditary, and who contrived oftentimes to line their own pockets with the proceeds of the taxes: for great barons who were sheriffs, were sometimes also officials of the Exchequer, and as such audited their own accounts. The local courts at last became merely the instruments of the Sheriffs and of the royal judges.

753. **Decline of the Sheriff's Powers.** — It was the overbearing power of the Sheriffs, thus developed, that led to the great changes which were to produce the county government of our own day. The interests alike of the Court and of the people became enlisted against them. The first step towards displacing them was taken when the royal justices were sent on circuit. Next, in 1170, under Henry II.'s capable direction, the great baronial sheriffs were tried for [illegible]ance in office,

and, though influential enough to escape formal conviction, were not influential enough to retain their offices. They were dismissed, and replaced by Exchequer officials directly dependent upon the Crown. In 1194, in the next reign, it was arranged that certain 'custodians of pleas of the crown' should be elected in the counties, to the further ousting of the Sheriffs from their old-time judicial prerogatives. Then came Magna Charta (1215) and forbade all participation by Sheriffs in the administration of the king's justice. Finally the tenure of the office of Sheriff, which was now little more than the chief place in the militia of the county and the chief ministerial office in connection with the administration of justice, was limited to one year. The pulling down of the old system was complete; fresh construction had already become necessary.

754. **Justices of the Peace.** — The reconstruction was effected through the appointment of 'Justices of the Peace.' The expedient of 'custodians of pleas of the crown' (*custodes placitorum coronæ*) elected in county court, as substitutes for the Sheriff in the exercise of sundry important functions of local justice, soon proved unsatisfactory. They, too, like the Sheriffs, were curtly forbidden by Magna Charta to hold any pleas of the crown; and they speedily became only the *coroners* we know ('crowners' Shakspere's grave-digger in *Hamlet* very appropriately calls them), whose chief function it is to conduct the preliminary investigation concerning every case of sudden death from an unknown cause. Better success attended the experiment of Justices of the Peace. At first 'Conservators' of the peace merely, these officers became, by a statute passed 1360, in the reign of Edward III., *justices* also, intrusted with a certain jurisdiction over criminal cases, to the supplanting of the Sheriff in the last of his judicial functions, his right, namely, to pass judgment in his *tourn* or petty court on police cases, — to apply the discipline of enforced order to small offences against the public peace.

755. Henceforth, as it turned out, the process of providing ways of local government was simple enough, as legislators chose to conduct it. It consisted simply in charging the Justices of the Peace with the doing of everything that was necessary to be done. Slowly, piece by piece, their duties and prerogatives were added to, till the Justices had become immeasurably the most important functionaries of local government, combining in their comprehensive official characters almost every judicial and administrative power not exercised from London. Not till the passage of the Local Government Act of 1888, already referred to, were they relegated to their older and most characteristic judicial functions, and their administrative and financial powers transferred to another body, the newly created County Council.

756. **Functions of Justices of the Peace prior to Recent Reforms.** — The Justice of the Peace has been very happily described as having been under the old system "the state's man of all work." His multifarious duties brought him into the service (*a*) of the Privy Council, under whose Veterinary Department he participated in the administration of the Acts relating to contagious cattle diseases; (*b*) of the Home Office, under which he acted in governing the county constabulary, in conducting the administration of lunatic asylums, and in visiting prisons; (*c*) of the Board of Trade, under whose general supervision he provided and tested weights and measures, constructed and repaired bridges, and oversaw highway authorities; and (*d*) of the Local Government Board, under whose superintendence he appointed parish overseers of the poor, exercised, on appeal, a revisory power over the poor-rates, and took a certain part in sanitary regulation. The Justices, besides, formerly levied the county tax, or 'rate,' out of which the expenses of county business were defrayed, issued licenses for the sale of intoxicating drinks (as they still do), for the storage of gunpowder and petroleum, and for other undertakings required by law to be licensed; they divided the counties into highway, polling, and coroners' districts; they issued orders for the removal of paupers to their legal place of settlement; they fulfilled a thousand and one administrative functions too various to classify, too subordinate to need enumeration, now that most of them have been transferred to the Councils. The trial of criminal cases, together with the performance of the various functions attend-

ant upon such a jurisdiction, always constituted, of course, one of the weightiest duties of their office, and is now its chief and almost only duty.

"Long ago," laughs Mr. Maitland, speaking before the passage of the Act of 1888, "long ago lawyers abandoned all hope of describing the duties of a justice in any methodic fashion, and the alphabet has become the only possible connecting thread. A Justice must have something to do with 'Railroads, Rape, Rates, Recognizances, Records, and Recreation Grounds'; with 'Perjury, Petroleum, Piracy, and Playhouses'; with 'Disorderly Houses, Dissenters, Dogs, and Drainage.'"[1]

757. **Character and Repute of the Office of Justice.** — The office of Justice of the Peace is representative in the same sense — not an unimportant sense — in which the unreformed parliaments of the early part of the century were representative of the county populations. The Justices are appointed from among the more considerable gentry of the counties, and represent in a very substantial way the permanent interests of the predominantly rural communities over whose justice they preside. An interesting proof of their virtually representative character appears in the popularity of their office during the greater part of its history. Amidst all the extensions of the franchise, all the remaking of representative institutions which this century has witnessed in England, the Justiceship of the Peace remained practically untouched, because on all hands greatly respected, until the evident need to introduce system into local government, and the apparent desirability of systematizing it in accordance with the whole policy of recent reforms in England by extending the principle of popular representation by election to county government, as it had been already extended to administration in the lesser areas, led to the substitution of County Councils for the Justices as the county authority in financial and administrative affairs.

758. **The Lord Lieutenant.** — In the reign of Mary a '*Lord Lieutenant*' took the place of the Sheriff in the County as head of the militia, becoming the chief representative of the crown in the County, and subsequently the keeper of the county records (*Custos Rotulorum*). The Sheriff, since the completion of this change, has been a merely administrative officer, executing the judgments of the courts, and presiding over

[1] *Justice and Police*, p. 84.

parliamentary elections. The command of the militia remained with the Lords Lieutenant until 1871, when it was vested in the crown, — that is, assumed by the central administration.

Justices of the Peace are still appointed by the Chancellor upon the nomination of the Lord Lieutenant of each county (sec. 743).

759. **The Reform of 1888.** — The reform of local administration proposed by the ministry of Lord Salisbury, in the spring of 1888, although not venturing so far as it would be necessary to go to introduce order and symmetry into a patchwork system, suggested some decided steps in the direction of simplification and co-ordination. The confusions of the existing arrangements were many and most serious. England is divided into counties, boroughs, urban sanitary districts, rural sanitary districts, poor-law parishes, poor-law unions, highway parishes, and school districts; and these areas have been superimposed upon one another with an astonishing disregard of consistent system, — without, that is, either geographical or administrative co-ordination. The confusions to be remedied, therefore, may be said to have consisted (*a*) of the overlapping of the various areas of local government, the smaller areas not being in all cases subdivisions of the larger, but defined almost wholly without regard to the boundaries of any other areas; (*b*) of a consequent lack of co-ordination and subordination among local authorities, fruitful of the waste of money and the loss of efficiency always resulting from confusions and duplications of organization; (*c*) of varieties of time, method, and franchise in the choice of local officials; and (*d*) of an infinite complexity in the arrangements regarding local taxation, the sums needed for the various purposes of local government (for the poor, for example, for the repair of highways, for county outlays, etc.) being separately assessed and separately collected, at great expense and at the cost of great vexation to the tax-payer.

Mr. Goschen is stated to have said in debate upon this subject, "Every one knows that the first reform needed is to consolidate all rates and to have one demand note for all rates, and a single authority for levying the rate and distributing the proceeds among such other authorities as have power to call for contributions. It is astonishing that this should not have been done already. Let me give you my personal experience. I myself received in one year eighty-seven demand notes on an aggregate valuation of about £1100. One parish alone sent me eight rate-papers for an aggregate amount of 12*s.* 4*d.* The intricacies of imperial finance are simplicity itself compared with this local financial chaos."

760. The ministry at first proposed to remedy this confusion, at least in part, by largely centring administration, outside the greater towns, in two areas, the County and the District. The system of poor-relief, through parishes and unions (secs. 780, 781, 787, 788), was to be left untouched, but a beginning was to be made in unification by making the Counties and Districts the controlling organs of local government, and provision was to be made for extensive readjustments of boundaries which would bring the smaller rural areas into proper relation and subordination to the larger by making them in all cases at least subdivisions of counties. Little was proposed in rectification of the financial disorder so patent and so wasteful under existing arrangements; but both County and District were to have representative councils presumably fitted ultimately to assume the whole taxing function. The franchise by which these bodies were to be elected was to be assimilated to the simplest and broadest used in local and parliamentary elections. It was proposed, moreover, in the interest of uniformity, that the constitution of the councils should be substantially the same as that of the borough and urban district councils already in existence.

761. Only a portion of this reform, however, made its way through Parliament and became an Act: the 'Local Government Bill,' though it retained its name, became in reality only a *County* Government Bill before it reached its passage. The

provisions relating to Districts were left out, and only the county was reorganized. The larger boroughs were given county privileges, the smaller brought into new and closer relations with the reconstructed county governments. London, too, was given a county organization. The integration of the smaller areas of rural administration with the new county system was left for another time.

This completion of the reform was promised for an early date by the ministry, however, and may perhaps be very soon accomplished.[1]

762. **Administrative Counties and County Boroughs.** — The Act of 1888, as it stands, co-ordinates Counties and what are henceforth to be called "County Boroughs." Every borough of not less than fifty thousand inhabitants at the time the Act was passed, or which was, before the passage of the Act, treated as a county (in all, sixty-one boroughs) is constituted a "county borough," and is put alongside the county in rank and privileges. This does not mean, as it would seem to mean, that these boroughs have been given a county organization. Paradoxically enough, it means just the opposite, that the counties have been given an organization closely resembling that hitherto possessed by the boroughs only. The nomenclature of the Act would be more correct, though possibly less convenient, had it called the counties 'borough counties' instead of calling some boroughs 'county boroughs.' The measure has been very appropriately described as an Act to apply the Municipal Corporations Act of 1882, whose main provisions date back as far as 1835 (sec. 794), to county government, with certain relatively unimportant modifications.

763. The counties designated by the Act are dubbed "administrative counties," because they are not in all cases the historical counties of the map. In several instances counties are separated into parts for the purposes of the reorganization. Thus the East Riding of Yorkshire constitutes one 'adminis-

[1] Written March, 1889.

trative county,' the North Riding another, and the West Riding a third; Suffolk and Sussex also have each an East and West division; Lincoln falls apart into three administrative counties, etc.

All boroughs of less than 50,000 inhabitants not treated as counties are more or less incorporated with the counties in which they lie.

If any urban sanitary district lie within more than one county, it is to be deemed to belong to the county in which the greater part of its population live according to the census of 1881.

764. **The County Councils: their Constitution.** — In pursuance of the purpose of assimilating county to borough organization, the counties are given representative governing assemblies composed of councillors and aldermen, presided over by a chairman whose position and functions reproduce those of the borough mayors, and possessing as their outfit of powers all the miscellany of administrative functions hitherto belonging to the Justices of the Peace. There is not, it should be observed, a Council and a Board of Aldermen, as in American cities, but a single body known as the Council and composed of two classes of members, the one class known as Aldermen, the other as Councillors. These two classes differ from each other, not in power or in function, but only in number, term, and mode of election. The Councillors are directly elected by the qualified voters of the County and hold office for a term of three years; the Aldermen are one-third as many as the Councillors in number, are elected by the Councillors, either from their own number or from the qualified voters outside, and hold office for six years, one-half of their number, however, retiring every three years, in rotation. This Council of Aldermen and Councillors elects its own chairman, to serve for one year, and pays him such compensation as it deems sufficient. During his year of service the chairman exercises the usual presidential, but no independent executive, powers, and is authorized to act as a Justice of the Peace, along with the rest of the 'Commission' of the County.

765. Any one may be elected a councillor who is a qualified voter in the county, or who is entitled to vote in parliamentary elections by virtue of ownership of property in the county; and in the counties, though not in the boroughs, from whose constitution this of the counties is copied, peers owning property in the county and "clerks in holy orders and other ministers of religion" may be chosen to the council.

766. **The number of councillors**, and consequently also the number of aldermen, in each County Council (for the latter number is always one-third of the former) was fixed in the first instance by order of the Local Government Board, and is in some cases very large. Thus Lancashire has a council (aldermen, of course, included) of 140 members, the West Riding of Yorkshire a council of 120, Devon a council of 104. Rutland, whose council is the smallest, has 28. The average is probably about 75.

767. For the election of councillors the county, including the boroughs which are not 'county boroughs,' is divided into *electoral districts*, corresponding in number to the number of councillors, one councillor being chosen from each district. The number of these districts having been determined by the order of the Local Government Board, their area and disposition were fixed in the first instance by Quarter Sessions, or, within the non-county boroughs needing division, by the borough Council, due regard being had to relative population and to a fair division of representation between rural and urban populations.

768. The number of councillors and the boundaries of electoral districts may be changed by order of the Local Government Board upon the recommendation of the council of a borough or county.

769. **The County Franchise.** — The councillors are elected, to speak in the most general terms, by the resident ratepayers of the county. Every person, that is to say, not an alien or otherwise specially disqualified, who is actually resident within the county or within seven miles of it, paying rates in the county and occupying, within the county, either jointly or alone, any house, warehouse, counting-house, shop, or other building for which he pays rates is entitled to be enrolled (if his residence has been of twelve months' standing) and to vote as a county elector.

A person who occupies land in the county of the annual value of £10 and who resides in the county, or within seven miles of it, may vote

in the elections for county councillors though his residence has been of only six months' standing.

Single women who have the necessary qualifications as ratepayers and residents are entitled to vote as county electors.

770. **Powers of the County Councils.** — The Council of each County is a body corporate, under the title of the "County Council of ——" (the name of the administrative county), and as such may have a common seal, hold property, make by-laws, etc. Its by-laws, however, unless they concern nuisances, are subject to approval by the Secretary of State,[1] and may be annulled by an order in Council.

(1) The Council holds and administers all county property, and may purchase or lease lands or buildings for county uses;

(2) With it rests the duty of maintaining, managing, and, when necessary, enlarging, the pauper lunatic asylums of the county, and of establishing and maintaining, or contributing to, reformatory and industrial schools;

(3) It is charged with maintaining county bridges, and all main roads in every part not specially reserved by urban authorities for their own management because lying within their own limits; and it may declare any road a main road which seems to serve as such, and which has been put in thorough repair, before being accepted by the county, by the local highway authorities (sec. 786);

(4) It administers the statutes affecting the contagious diseases of animals, destructive insects, fish preservation, weights and measures, etc.;

(5) It appoints, pays, and may remove the county Treasurer, the county coroner, the public surveyor, the county analyst, and all other officers paid out of the county rates — except the clerk of the Peace and the clerks of the Justices — including the medical health officers, though these latter functionaries report, not to the Council (the Council receives only

[1] Presumably the Home Secretary.

a copy of their report), but to the Local Government Board, and the only power of the Council in the premises is to address to the Board, independently and of their own motion, representations as to the enforcement of the Public Health Acts where such representations seem necessary;

(6) It determines the fees of the coroner and controls the division of the county into coroners' districts;

(7) It divides the county into polling districts also for parliamentary elections, appoints voting places, and supervises the registration of voters;

(8) It sees to the registering of places of worship, of the rules of scientific societies, of charitable gifts, etc.

It is obviously impossible to classify or make any generalized statement of this miscellany of powers: they must be enumerated or not stated at all. They are for the most part, though not altogether, the administrative powers formerly intrusted to the Justices of the Peace.

771. **The licensing function**, as being semi-judicial, is left in most cases with the Justices of the Peace; but the County Council is assigned the granting of licenses to music and dancing halls, to houses which are to be devoted to the public performance of stage plays, and for the keeping of explosives.

Oddly enough, the County Council is, by another section of the Act of 1888, authorized to delegate its powers of licensing in the case of playhouses and in the case of explosives back to the Justices again, acting in petty sessions. The same section also permits a similar delegation to the Justices of the powers exercised by the Council under the Act touching contagious cattle diseases.

772. **The financial powers** of the Council are extensive and important. The Council takes the place of the Justices in determining, assessing, and levying the county, police and hundred rates, in disbursing the funds so raised, and in preparing or revising the basis or standard for the county rates; though in this last matter it acts subject to appeal to Quarter Sessions. It may borrow money, "on the security of the county fund," for the purpose of consolidating the county debt, purchasing

property for the county, or undertaking permanent public works, provided it first obtain the consent of the Local Government Board to the raising of the loan. The Board gives or withholds its consent only after a local inquiry, and, in case it assents, fixes the period within which the loan must be repaid, being itself limited in this last particular by a provision of law that the period must never exceed thirty years.

If the debt of the county already exceed ten *per cent.* of the annual ratable value of the ratable property of the county, or if the proposed loan would raise it above that amount, a loan can be sanctioned only by a *provisional* order of the Board, — an order, that is, which becomes valid only upon receiving the formal sanction of parliament also, given by public Act.

A county may issue stock, under certain limitations, if the consent of the Local Government Board be obtained.

773. **Additional Powers.** — The Act of 1888 provides that any other powers which have been conferred upon the authorities of particular localities by special Act, and which are similar in character to those already vested in the County Councils, may be transferred to the proper County Councils by *provisional* order of the Local Government Board; and also that a similar provisional order of that Board may confer upon a County Council any powers, *arising within the County*, which are now exercised by the Privy Council, a Secretary of State, the Board of Trade, the Local Government Board itself, or any other government department, provided they be powers conferred by statute and the consent of the department concerned be first secured.

774. **The County Budget.** — At the beginning of every local financial year (April 1st) an estimate of the receipts and expenditures of the year is submitted to the Council, and upon the basis of this, the Council makes estimate of the sums to be needed, and fixes the rates accordingly. The Council's estimate is made for two six-month periods, and is subject to revision for the second six-month period, provided the experience of the first prove it necessary either to increase or decrease the amounts to be raised.

775. Returns of the actual receipts and expenditures of each financial year are also made to the Local Government Board,

in such form and with such particulars as the Board directs; and full abstracts of these returns are annually laid before both Houses of Parliament. The county accounts are, moreover, periodically audited by district auditors appointed by the Local Government Board.

The accounts of the county Treasurer are audited, too, by the Council.

776. Local rates are assessed exclusively upon real estate, and, until the passage of the Local Government Act of 1888, it was the habit of Parliament to make annual 'grants in aid of the rates' from the national purse, with the idea of paying out of moneys raised largely upon personal property some part of the expense of local administration. The Act of 1888 substitutes another arrangement. It provides that all moneys collected from certain licenses (a long list of them, from liquor licenses to licenses for male servants and guns), together with four-fifths of one-half of the proceeds of the probate duty, shall be distributed among the counties from the imperial treasury, under the direction of the Local Government Board, for the purpose of defraying certain specified county expenses, notably for the education of paupers and the support of pauper lunatics.

777. **The police powers,** long exercised by the Justices of the Peace, are now exercised by a joint committee of Quarter Sessions and the County Council. This committee is made up, in equal parts, of Justices and members of the Council; elects its own chairman, if necessary (because of a tie vote), by lot; and acts when appointed, not as exercising delegated authority, but as an independent body. The term of the committeemen is, however, determined by the bodies which choose them.

778. The County Council is empowered to act in the exercise of all but its financial powers through committees, and to join in action with other local authorities in any proper case through a standing joint committee such as that which has control of the constabulary.

779. **Boundaries.** — The Act of 1888 provides for the much needed co-ordination of areas by empowering the Local Government Board,

acting upon the recommendation of a county or a borough council, and after a local inquiry publicly held before a Local Government Board inspector, to make an order for the alteration of county or borough boundaries, for the union of two boroughs, or for the alteration of any area of local government only partly included in a county or borough. Such an order is provisional, however, and must await the assent of Parliament.

A County Council, moreover, may itself provide for the alteration or definition of the boundaries of any parish or any county district which is not a borough, for the union of such parish or district with other districts or parishes, or for the conversion of rural into urban, or urban into rural, districts. In case such an order is made by a Council, however, three months is to be allowed for protests on the part of county electors. These protests are to be addressed to the Local Government Board. In case a protest is entered under the proper conditions as to number and electoral qualification of the protestants, a local inquiry must be held, and the order may be disallowed. If there be no contest made in the matter, the order must be confirmed.

780. **The Parish.** — Parishes there have been in England ever since the Christian church was established there; but the Parish which now figures most prominently in English local government inherits only its name intact from those first years of the national history. The church, in its first work of organization, used the smallest units of the state for the smallest divisions of its own system; it made the township its parish; and presently the priest was always seen going up with the reeve and the four men of the township to the hundred and the county courts. Only where the population was most numerous did it prove necessary to make the parish smaller than the township; only when it was least numerous did it seem expedient to make the parish larger than the township. Generally the two were coincident. During much the greater part of English history, too, citizenship and church membership were inseparable in fact, as they still are in legal theory. The vestry, therefore, which was the assembly of church-members which elected the church-wardens and regulated the temporalities of the local church, was exactly the same body of

persons that, when not acting upon church affairs, constituted the township meeting. It was the village moot 'in its ecclesiastical aspect.' And when the township privileges were, by feudalization, swallowed up in the manorial rights of the baronage, the vestry was all that remained of the old organization of self-government; the court, or civil assembly, of the township was superseded by the baron's manorial court. But the church was not absorbed; the vestry remained, and whatever scraps of civil function escaped the too inclusive sweep of the grants of jurisdiction to the barons the people were fain to enjoy as vestrymen.

781. **The Poor-law Parish.** — It was in this way that it fell out that the township, when acting in matters strictly non-ecclesiastical came to call itself the parish, and that it became necessary to distinguish the 'civil parish' from the 'ecclesiastical parish.' The vestry came at last to elect, not church-wardens only, but way-wardens also, and assessors; and in the sixteenth century (1535, reign of Henry VIII.) the church-wardens were charged with the relief of the poor. We are thus brought within easy sight of the only parish of which it is necessary to speak at any length in describing the present arrangements of local government in England, the Poor-law Parish, namely. The legislation of the present century, which has been busy about so many things, has not failed to readjust the parish: in most cases, as altered by statute to suit the conveniences of poor-law administration, "the modern civil parish coincides neither with the ancient civil parish, nor with the ecclesiastical parish," but has been given a new area peculiar to itself. Still, the old parochial machinery survives, and the old parochial duty of contributing to the support of the poor. The Poor-law Parish has still its vestry which elects parish officers; and still also the church-wardens are *ex officio* overseers of the poor. The important feature of the new administration is, that as actual administrators the par officers have been subordinated to a wider authority

parish is the unit of taxation for the support of the poor, but the work of assessing and collecting the taxes is done by overseers appointed by the county Justices, not by the church-wardens, who are now associate, *ex officio*, overseers merely; and the active administration of poor-relief has been intrusted to the authorities of the 'Union.' The history of the parish, as an area of civil government, is important, therefore, not because of what the parish is, but because of what the parish has been. The administrative history of the parish rounds out the administrative history of the county, by showing how the parish-township, the original constituent unit of the county, has been overlaid by later constructions.

782. Poor-law parishes know no distinction between town and country. They cover a certain definite area, whether that area lies within a town or without, or partly within and partly without. They thus often combine urban with rural populations for the purposes of poor-law taxation.

783. The ordinary overseers are not paid officers; but one or more *assistant* overseers, who are paid, may be elected by the vestry of a poor-law parish (to be appointed under the seal of the Justices); and when such officers are appointed they naturally do most of the work.

784. The duties now remaining with the vestry are, chiefly, the management of parochial property and the administration of certain locally optional acts, when adopted, concerning the establishment and maintenance of free libraries and the special lighting and patrolling of the parochial territory.

Vestries are either 'common' or 'select.' A 'common' vestry consists of all the ratepayers of the parish, — is a general parish meeting. A 'select' vestry consists of elected representatives of the ratepayers.

785. The parish serves as an electoral and jury district as well as a tax district, and the overseers of the poor, besides assessing and raising the poor-rates, make out the jury lists and the lists of parliamentary, county, and municipal voters.

786. **The Highway Parish.** — Various rural 'parishes,' some of which coincide with the poor-law parish, but others of which are quite distinct, are charged with an administrative part in the maintenance of the highways. Often, however, rural parishes are grouped for this purpose into larger 'Highway Districts' created by order of the Justices in

Quarter Sessions, and whose way-wardens are elected by the several component parishes. Urban districts, again, have, in their turn, separate highway authorities of their own.

787. **The Union.** — The Union is primarily an aggregation of parishes effected with a view to a wider and better administration of the poor-laws; though, like most of the districts of local government in England, it has been charged since its formation with many functions in no way connected with the purposes for which it was originally created. In 1834 a central Commission was constituted by Act of Parliament to exercise a general oversight over the administration of the poor-laws, the Act being known as the Poor Law Amendment Act. This Commission was authorized to group the parishes of the kingdom into 'Unions' for the better organization and control of poor-relief. It was succeeded in time by a more complete Poor Law Board; and that Board, in its turn, by the present Local Government Board. This latter now completely controls the Unions: it can change, abolish, or subdivide them; it controls the appointment and dismissal of all Union officers; and it audits, through special district auditors, Union accounts.

788. The administrative authority of the Union is a Board of Guardians, consisting of the Justices residing within the Union, who are members *ex officio*, and of members elected by the several parishes composing the Union, — every parish which contains as many as three hundred inhabitants being entitled to choose at least one Guardian. It is the elected members, of course, and not the Justices, who really act in the Board.

789. **The Rural Sanitary District.** — Later legislation has charged the Board of Guardians with the care of the sanitation of all parts of the Union which lie outside urban limits, thus erecting the rural portions of each Union into a special Rural Sanitary District.

790. Besides their duties of poor-relief and sani- Guardians of each Union are charged

of births and deaths, to the lighting of such portions of their districts as need to be lighted, though lying outside technically urban limits, and with the administration of the laws concerning vaccination.

791. The Local Government Board fixes for the Guardians a property qualification, which is to be in no case above £40 rating. The Guardians are elected by the "owners and ratepayers" of each parish, each voter being entitled to one vote for every £50 of rated property up to a total number of six votes. If any one be entitled to vote both as owner and as ratepayer, he may cast as many as twelve votes, in case he is rated to a sufficient amount.

792. Unions are of all sizes and plans, though it is within the power of the Local Government Board to readjust their boundaries and bring them into proper geographical relations with other larger areas. The only rule heretofore observed as to their make-up is, that they are always to be aggregations of parishes already existing. They have not been conformed to county boundaries at all. It is stated that in 1882, out of a total of 617 Unions, 176 "included parts of two or more counties, and of these 29 were each in three counties, and four were each in four counties."[1] Unions vary so greatly in size that it is estimated that some contain as many as one hundred and twenty times the population of others. The average population of the Unions is said to be about 45,000.

793. **Municipalities.** — A comprehensive view of municipal government in England must embrace both those governmental agencies which English law describes as municipal corporations and those which it calls Urban Sanitary Districts. Urban Sanitary Districts are simply less developed municipal corporations: sanitary regulation is their chief but by no means their only function. In any logical classification, they must be regarded as a species of municipal government.

794. **I. Municipal Corporations.** — The constitution of those English towns which have fully developed municipal organizations rests upon the Municipal Corporations Act of 1835 and its various amendments as codified in an Act of 1882 of the same name. This latter Act is, in its turn, in some degree altered by the Local Government Act of 1888. If the inhabi-

[1] *Local Administration*, p. 40.

tants of any place wish to have it incorporated as a municipality, they must address a petition to that effect to the Privy Council. Notice of such a petition must be sent to the Council of the county in which the place is situate and also to the Local Government Board. The Privy Council will appoint a committee to consider the petition, whose consideration of it will consist in visiting the place from which the petition comes and there seeing and hearing for themselves the arguments *pro* and *con*. All representations made upon the subject by either the County Council or the Local Government Board must also be considered.

Generally there is considerable local opposition either to such a petition being offered or to its being granted when offered; for the government of the place is usually already in the hands of numerous local authorities of one kind or another who do not relish the idea of being extinguished, and there are, of course, persons who do not care to take part in bearing the additional expenses of a more elaborate organization.

If the petition be granted, the Privy Council issue a charter of incorporation to the place, arranging for the extinction of competing local authorities, setting the limits of the new municipality, determining the number of its councillors, and often even marking out its division into wards.

795. Once incorporated, the town takes its constitution ready-made from the Act under whose sanction it petitioned for incorporation. That Act provides that the official name of the borough shall be "The Mayor, Aldermen and Burgesses of ——"; that it shall be governed, that is, by a mayor, aldermen, and councillors. The councillors hold office for a term of three years, one-third of their number going out, in rotation, every year. There are always one-third as many aldermen as councillors. The aldermen are elected by the councillors for a term of six years, one-half of their number retiring from office every three years, by rotation. The mayor is elected by the Council — by the aldermen and councillors, that is, — holds

office for one year only, and, unlike the councillors and aldermen, receives a salary. The councillors are elected by the resident ratepayers of the borough. "Every person who occupies a house, warehouse, shop, or other building in the borough, for which he pays rates, and who resides within seven miles of the borough, is entitled to be enrolled as a burgess." [1]

796. **Judicial Status of Boroughs.** — Whatever powers are not specifically granted to a municipality remain with previously constituted authorities. Local organization has proceeded in England by subtraction — by the subtracting of powers from old to be bestowed upon new authorities. New areas have been superimposed upon and across old areas and new authorities have had set apart to them special portions of governmental power; the old authorities have kept the rest. Thus the Union has been not at all affected, as an area of poor-relief, by the superimposition of boroughs or of Urban Sanitary Districts upon it. In the same way, because the Municipal Corporations Act does not provide for the exercise of judicial powers by the authorities of a borough by virtue of their separate incorporation, those powers remain with the Justices: unless additional special provision is made to the contrary, a municipality remains, for the purpose of justice, a part of the county. By petition, however, it may obtain an additional 'commission of the peace' for itself, or even an independent Court of Quarter Sessions. Either, then, (*a*) a borough contents itself in judicial matters with the jurisdiction of the county Justices; or (*b*) it obtains the appointment of additional Justices of its own, who are, however, strictly, members of the county commission and can hold no separate Court of Quarter Sessions; or (*c*) it acquires the privilege of having Quarter Sessions of its own. In the latter case a professional lawyer is appointed by the Crown, under the title of Recorder, to whom is given the power of two Justices acting together and

[1] Chalmers, *Local Government*, p. 74.

the exclusive right to hold Quarter Sessions — who is made, as it were, a multiple Justice of the Peace.

Boroughs which have a separate commission of the peace are known as "counties of towns"; those which have independent Quarter Sessions as "quarter sessions boroughs."

Every mayor is *ex officio* Justice of the Peace, and continues to enjoy that office for one year after the expiration of his term as mayor. This is true even when his borough has no separate commission of the peace.

797. **County Boroughs.** — In every borough the mayor, aldermen, and councillors, sitting together as a single body, constitute the 'Council' of the corporation; and the powers of the Council, if the borough be a 'County Borough,' are very broad indeed. Since the passage of the Local Government Act of 1888, it is necessary to distinguish, in the matter of powers, several classes of boroughs. 'County Boroughs' stand apart from the counties in which they lie, for all purposes of local government, as completely as the several counties stand apart from each other. Except in the single matter of the management of their police force, they may not even arrange with the county authorities for merging borough with county affairs. Their Councils may be said, in general terms, to have, within the limits of the borough, all the powers once belonging to the county Justices except those strictly judicial in their nature, all the sanitary powers of urban sanitary authorities, often the powers of school administration also, — all regulative and administrative functions except those of the poor-law Union, which hitherto has spread its boundaries quite irrespective of differences between town and country. In the case of these 'county boroughs,' all powers conferred upon counties are powers conferred upon them also.

If the Council of any borough or of a county make representation to the Local Government Board that it is desirable to constitute a borough that has come to have a population of not less than fifty thousand a 'county borough,' the Board shall, unless there be some special reason

to the contrary, hold a local inquiry and provide for the gift of county *status* to the borough or not as they think best. If they order the borough constituted a 'county borough,' the order is *provisional* merely.

798. **Other Boroughs.** — Boroughs which have not been put in the same rank with counties and given full privileges of self-administration as 'county boroughs,' fall into three classes in respect of their governmental relations to the counties in which they lie:

(1) Those which have their own Quarter Sessions and whose population is ten thousand or more. These constitute for several purposes of local government parts of the counties in which they are situate. The main roads which pass through them are cared for by the county authorities, unless within twelve months after the date at which the Act of 1888 went into operation (or after the date at which any road was declared a 'main road') the urban authorities specially reserved the right to maintain them separately. They contribute to the county funds for the payment of the costs of the assizes and judicial sessions held in them. They send members, too, to the County Council. Their representatives, however, cannot vote in the County Council on questions affecting expenditures to which the parishes of the borough do not contribute by assessment to the county rates. Beyond the few matters thus mentioned, they are as independent and as self-sufficient in their organization and powers as the 'county boroughs' themselves.

(2) Boroughs which have separate Quarter Sessions but whose population numbers less than ten thousand. These are made by the Act of 1888 to yield to the Councils of the counties in which they lie the powers once exercised by their own Councils or Justices in respect of the maintenance and management of pauper lunatic asylums, their control of coroners, their appointment of analysts, their part in the maintenance and management of reformatory and industrial schools, and in the administration of the Acts relating to fish conservation, explosives, and highways and locomotives.

They may, in view of their diminished powers, petition the Crown to revoke the grant to them of separate Quarter Sessions.

(3) Boroughs which have not a separate court of Quarter Sessions and whose population is under ten thousand are for all police purposes parts of the counties in which they are situate, and have, since the Act of 1888 went into operation, parted with very many of their powers to the County Councils. They have been, in brief, for all save a few of the more exclusively local matters of self-direction, merged in the counties, in whose Councils they are, of course, like all other parts of the counties, represented.

799. Every borough has its own paid Clerk and Treasurer, who are appointed by the Council and hold office during its pleasure, besides "such other officers as have usually been appointed in the borough, or as the Council think necessary." If a borough have its own Quarter Sessions, it has also, as incident to that Court, its own Clerk of the Peace and its own Coroner.

800. **The financial powers** of a municipal Council are in all cases strictly limited as regards the borrowing of money. "In each instance, when a loan is required by a municipal corporation, the controlling authority [the Local Government Board] is to be applied to for its consent. A local inquiry, after due notice, is then held, and if the loan is approved, a term of years over which the repayment is to extend is fixed by the central authority."[1]

801. "The accounts of most local authorities are now audited by the Local Government Board, but boroughs are exempt from this jurisdiction. The audit is conducted by three borough auditors, two elected by the burgesses, called elective auditors, one appointed by the mayor, called the mayor's auditor."[2]

802. **II. Urban Sanitary Districts.** — "The boundaries of poor-law unions are the boundaries of rural sanitary districts, and the guardians are the rural sanitary authority. The urban districts are carved out of the rural districts according to the

[1] Bunce, *Cobden Club Essays*, 1882, p. 283; title, "Municipal Boroughs and Urban Districts." [2] Chalmers, p. 87.

exigencies of population."[1] The organization of an Urban Sanitary District is more highly developed than that of a rural district; urban districts are in reality a subordinate species of municipalities. The method of their creation is quite simple. If the Local Government Board think it expedient for the public health and good government that any rural district should be specially organized as a local government district, or if "the owners and ratepayers of any district having a definite boundary" desire such organization, the district may be created an Urban Sanitary District by order of the Board. When such an order is issued it determines, as does the incorporating act of the Privy Council in the case of a municipality, the boundaries of the area, arranges, if necessary, for its division into wards, and fixes the number of members to sit in its local board. For the rest, the District takes its constitution from the Public Health Act of 1875,—an Act which amends and codifies legislation of 1848 and subsequent years. That Act puts the government of the District into the hands of a board, which is chosen by the owners and ratepayers just as the councillors of a borough are (sec. 795), but under arrangements which admit of cumulative voting as in the case of Guardians in the Unions (sec. 791). The powers of the board are first of all sanitary; but there are added to its sanitary powers other powers which make it in effect a lesser municipal council.

803. The difference between boroughs and urban districts is not at all a difference of size,—boroughs range from a few hundred to half a million inhabitants and urban districts from a few hundred to a hundred thousand;[2] it has hitherto been a difference, apparently, of local preference rather, and of legal convenience. The boundaries of a borough, when once fixed by a charter of incorporation, could, until the passage of the Act of 1888, be altered only by a special Act of

[1] Chalmers, p. 109. [2] Bunce, p. 293.

Parliament: it is much easier, of course, to apply to the Local Government Board. As towns already incorporated have grown, therefore, the added portions have become independently incorporated Urban Sanitary Districts, and thus the town has been pieced out. One writer, therefore, was able to say, in 1882, "Nowhere, from one end of England to the other, do we find an instance (Nottingham alone excepted) of a large borough which is municipally self-contained, and consequently self-governing." [1]

804. Under the Local Government Act of 1888 the boundaries of a borough may, as we have seen (sec. 779), be altered by provisional order of the Local Government Board, upon the address of the borough Council. This order, however, being provisional, must receive the sanction of Parliament, and is made only after local inquiry. The proceedings, therefore, for changing the boundaries of a borough are still much more elaborate and difficult than the free action of the Local Government Board with reference to urban sanitary districts. Formerly a separate bill, not introduced by the government, was needed to change the boundaries of a borough; now an Act approving a provisional order backed by the Local Government Board and likely to be acted upon favorably.

Out of 25,986,286 persons in England and Wales, Mr. Bunce estimates, following the census of 1881, 17,285,026 to have been under urban authority, 8,683,260 under rural.[2]

805. **Central Control of Urban Authorities.** — Full municipal corporations look partly (in the matter of sanitary regulation, for example,) to the Local Government Board as a central authority exercising powers of supervision, partly (in the management of the constabulary, for instance,) to the Home Office, and partly (if seaports) to the Board of Trade. Urban Sanitary Districts, however, have but a single authority set over them, the Local Government Board.

806. **'Improvement Act Districts.'** — Besides the Urban Sanitary Districts, there are still about fifty districts which have boards with quite similar powers under special 'Improvement Acts' passed from time to time with reference to particular localities. These boards are known as Improvement Commissioners.

807. **London.** —The metropolis was, until the passage of the Act of 1888, the unsolved problem, the unregenerate monster,

[1] Bunce, p. 298. [2] *Ibid.*, p. 285.

of local government in England. The vast aggregation of houses and population known by the world as 'London,' spreading its unwieldy bulk, as it did, over parts of the three counties of Middlesex, Surrey, and Kent, consisted of the *City* of London, a small corporation at its centre confined within almost forgotten boundaries, still possessing and beligerently defending mediæval privileges and following mediæval types of organization and procedure, and, round about this ancient City as a nucleus, a congeries of hundreds of old parishes and new sanitary districts made from time to time to meet the needs of newly grown portions of the inorganic mass. This heterogeneous body of mediæval trade guilds, vestries, and sanitary authorities had been in some sort bound together since 1855 by a Metropolitan Board of Works which exercised certain powers over the whole area outside the 'City.'

808. The Local Government Act of 1888 makes of the metropolis, not a 'county borough,' but a county, — the 'Administrative County of London' — with its own Lord Lieutenant, Sheriff, and Commission of the Peace, as well as its own Council. This leaves the parishes and district authorities of its area to retain such powers as they would possess were they situate in a rural, instead of in a metropolitan, county. It leaves the City, too, to occupy its separate place in the great metropolitan county as a quarter sessions borough not enjoying separate county privileges, — with some limitations special to its case.

809. The number of councillors in the London County Council is fixed at twice the number of members returned to Parliament, at the time of the passage of the Act of 1888, by the various constituencies of the metropolitan area. The Councillors, thus, number 118. The Council of the Metropolis is put upon an exceptional footing with regard to its quota of aldermen. The aldermen are to be one-sixth, instead of one-third, as many as the councillors. The total membership of the London Council is, therefore, 137.

810. **School Districts.** — The only important area remaining to be mentioned is the School District. Under the great Edu-

cation Act of 1870 and the supplementary Acts of 1876 and 1880, England is divided for educational purposes into districts which are under the supervision of the Education Department of the Privy Council. These districts are not mapped out quite so independently of previously existing boundaries as other local areas have been; they are made to coincide, so far as possible, with parishes or with municipal boroughs, the adjustment of their boundaries being left, however, to the discretion of the Education Department. Those districts which desire such an organization are given an elective School Board, chosen by the ratepayers, which has power to compel attendance upon the schools in accordance with the Education Acts, and to provide, under the direction of the Department, the necessary school accommodation. Other districts are governed in school matters by an Attendance Committee, simply, which is a sub-committee of some previously existing authority (in boroughs, of the town council, for instance) and whose only duties are indicated by its name.

811. The plan of public education in England contemplates the assistance and supplementing of private endeavor. Where private schools suffice for the accommodation of the school population of a district, the government simply superintends, and, under certain conditions, aids. Where private schools are insufficient, on the other hand, the government establishes schools of its own under the control of a school board.

812. **Central Control.** — The plan of central control in England is manifestly quite indigenous. The central government is not present in local administration in the person of any superintending official like the French Prefect (secs. 338, 339, 346), or any dominant board like the 'Administration' of the Prussian Government District (secs. 480–483). There has, indeed, been developing in England throughout the last half of this century a marked tendency to bring local authorities more and more under the supervision in important matters of the government departments in London, — a tendency which has led to the concentration, since 1871, in the hands of the

Local Government Board of various powers once scattered among such authorities as the Home Office, the Privy Council, etc. But this tendency, which is towards control, has not been towards centralization. It has, so far, not gone beyond making the advice of the central authority always accessible by local officers or bodies, and its consent necessary to certain classes of local undertakings. The central government has not itself often assumed powers of origination or initiative in local affairs. Even where the Local Government Board is given completest power the choice of the officers who are to put its regulations into force is left with the ratepayers in the districts concerned. Thus the authority of the Board over the Guardians of the Unions is complete; but the Guardians are elected in the parishes. Its authority in sanitary matters makes its directions imperative as to the execution of the Public Health Acts; but in many cases the local health officers are appointees of the local bodies. It may disallow the by-laws passed by the boards of sanitary districts, and the by-laws enacted by the county authorities, unless they affect nuisances, may be annulled by an order in Council; but these are powers sparingly, not habitually, used. In the matter of borrowing money, too, local authorities are narrowly bound by the action of the Local Government Board; and its assent to propositions to raise loans is seldom given without very thorough inquiry and without good reason shown. But all these are *functions of system*, so to say, rather than of centralization. Co-ordination in methods of poor-relief is sought, that relief being given under national statutes, and co-operation of central with local judgment in financial matters, local debts constituting a very proper subdivision of national finance. But the spirit in which the control is exercised, as well as the absence of permanent officials representing the central authority in local government, and even of permanent instrumentalities for the administration of financial advice, bespeak a system of co-operation and advice rather than of centralization.

The Government of the English Colonies.

813. **English Colonial Expansion.** — Doubtless the most significant and momentous fact of modern history is the wide diffusion of the English race, the sweep of its commerce, the dominance of its institutions, its imperial control of the destinies of half the globe. When, by reason of the closing of the old doors to the East by the Turk and the consequent turning about of Europe to face the Atlantic instead of the Mediterranean, England was put at the front instead of at the back of the nations of the Continent, a profound revolution was prepared in the politics of the world. England soon defeated Holland and Spain and Portugal, her rivals for the control of the Atlantic and its new continents; and steadily, step by step, she has taken possession of every new land worth the having in whatever quarter of the globe. With her conquests and her settlers have gone also her institutions, until now her people everywhere stand for types of free men, her institutions for models of free government.

814. **English Colonial Policy.** — It is only by slow degrees, however, that England has learned the right policy towards her colonies. She began, as Rome did, by regarding her possessions as estates, to be farmed for her own selfish benefit. Nothing less than the loss of America sufficed to teach her how short-sighted such a policy was. But, unlike Rome, she was fortunate enough to lose the best part of her possessions without being herself overwhelmed; and even after the loss of America, time and opportunity offered for the building up of another colonial empire scarcely less great.

815. Towards her present colonies her policy is most liberal; for the England of the present is a very different England from that which drove America into rebellion. Even the notable lesson emphasized in the loss of America would not have sufficed to bring England to her senses touching her true interests in the colonies, had she not herself speedily thereafter

been brought by other causes to a change of heart. The movements of opinion which stirred her to religious revival, to prison reform, to enlightened charity, to the reform of parliamentary representation, to a general social and political regeneration, stirred her also, no doubt, to vouchsafe to her colonists full rights as Englishmen.

816. **Lord Durham in Canada.** — The turning point was reached in 1837, when a rebellion broke out in Lower Canada. Lower Canada was French Canada. Its government, like the governments of the American states south of it in their own colonial times, consisted of an Executive, a Legislative Council nominated by the Crown and a legislative chamber elected by the colonists; the colonists had been exasperated by just such arbitrariness and lack of sympathy on the part of the Governor and his Council, and just such efforts to make the salaries and the maintenance of the judicial officers of the colony independent of the appropriations voted by the popular assembly, as had hastened the separation of the United States from England; and at last rebellion had been made to speak the demands of the colonists for constitutional reform. The rebellion was put down, but the defeated colonists were not treated as they would have been in 1776. A royal commissioner was sent out to them from the mother country to redress their grievances by liberal measures of concession and reform. This commissioner was Lord Durham. He spoiled his mission by well-meant but arbitrary conduct which was misunderstood at home, and was recalled; but his report upon the condition of Canada and the measures necessary for her pacification may justly be called the fountain head of all that England has since done for the betterment of government in her colonies. Lord Durham recommended nothing less than complete self-government, with interference from England in nothing but questions immediately and evidently affecting imperial interests. 1847 saw independent responsible self-government completely established in Canada, and subsequent years have

seen it extended to all the British colonies capable of self-direction.

817. **The Self-Governing Colonies.** — The English colonies, as at present organized, may be roughly classified in two groups as (*a*) *Self-governing* and (*b*) *Crown* colonies. The self-governing colonies are nine in number; namely, Canada, Newfoundland, Cape of Good Hope, the four colonies of the east and south of Australia (Queensland, New South Wales, Victoria, South Australia), Tasmania, New Zealand. In all of these there is practically complete independence of legislation in all matters not directly touching imperial interests: and in all there is full responsible government, — government, that is, through ministers responsible to representatives of the people for their policy and for all executive acts, because chosen from and representing the majority in the popular chamber. In the Cape of Good Hope, Tasmania, Victoria, and South Australia, both branches of the legislature are elected; in the other five the upper chamber, the Legislative Council, as it is invariably called outside of Canada, is nominated by the Executive. But the origin of the upper chamber does not affect the full responsibility of the ministers or the practically complete self-direction of the colony.

818. **The Government of Canada.** — In 1840 Parliament provided by Act for the union of Upper and Lower Canada (now the provinces of Ontario and Quebec) upon a basis suggested by Lord Durham's report; but the legislative union of these two provinces, the one English, the other almost wholly French, was ill-advised and proved provisional only. Although an Act of 1854 granted to the united colonies a government as nearly as might be modelled upon the government of England herself, no satisfactory basis of self-government was reached until, by the 'British North America Act' of 1867, the colonies were at once separated and re-integrated by means of a federal constitution. That Act is the present constitution of the "Dominion of Canada." Under that constitution the

seven provinces now comprised within the Dominion, namely, Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, British Columbia, and Prince Edward Island, have each a separate parliament and administration. In each a Lieutenant-Governor presides; in each, as in the Dominion itself, there is a ministry responsible for its policy and executive acts to a parliament fully equipped for self-direction in local affairs.

819. The provisions of the British North America Act were drafted in Canada and accepted by the Parliament in England without alteration. In the division of powers which they make between the government of the Dominion and the governments of the several provinces, they differ very radically in character from the provisions of our own federal constitution. Our constitution grants certain specified powers to the general government and reserves the rest to the states; the British North America Act, on the contrary, grants certain specified powers to the provinces and reserves all others to the government of the Dominion. Among the powers thus reserved to the federal government is that of enacting all criminal laws.

In Ontario, British Columbia, and Manitoba, the legislature consists of but a single house.

820. The government of the Dominion is a very faithful reproduction of the government of the mother country. The Crown is represented by the Governor-General, who acts in the administration of the colony as the Crown acts in the administration of the kingdom, through responsible ministers, and whose veto upon legislation is almost never used. His cabinet is known as the Queen's Privy Council and consists of fifteen members, representing the majority in the popular house of the legislature, leading that house in legislation, and in all its functions following the precedents of responsible cabinet government established in England. The legislature consists of two houses, the Senate and the House of Commons. The Senate consists of seventy-eight members nominated for life by the Governor-General, — that is, in effect, appointed by the ministers; for in the composition of the Senate, as in the creation of peers at home, the advice of the ministers is decisive. The

House of Commons consists at present of two hundred and fifteen members elected from the several provinces, for a term of five years, upon the basis of one representative for every twenty thousand inhabitants, it being understood, however, that Quebec shall always have sixty-five members.

821. Besides his veto, the Governor-General has the right to reserve measures for the consideration of the Crown (*i.e.*, of the ministers in England), and this right he sometimes exercises. He may also disallow acts of the provincial legislatures.

822. The fifteen ministers composing the Council or cabinet are, a Prime Minister and President of the Council, a Minister of Public Works, a Minister of Railways and Canals, a Minister of Customs, a Minister of Militia and Defence, a Minister of Agriculture, a Minister of Inland Revenue, a Secretary of State, a Minister of Justice, a Minister of Finance, a Minister of Marine and Fisheries, a Minister of the Interior, and a Postmaster-General, besides two ministers without portfolios.

823. The distribution of representation in the Dominion House of Commons is at present as follows: Ontario has 92 members, Quebec 65, Nova Scotia 21, New Brunswick 16, Manitoba 5, British Columbia 6, Prince Edward Island 6, and the North West Territories (not yet fully admitted to provincial rank) 4. The representatives are elected by a franchise based upon a small property qualification.

824. The Parliament of the Dominion may be dissolved by the Governor-General upon the advice of the ministers and a new election held, as in England, when an appeal to the constituencies is deemed necessary or desirable.

825. **The Governments of Australia.** — The governments of the Australian colonies are not different in principle, and are very slightly different in structure, from the government of Canada, except that in Australia the colonies stand apart in complete independence of each other, having no federal bonds, no common authority nearer than the mother country. Alike in Queensland and in New South Wales there is a nominated Legislative Council and an elected Legislative Assembly; but in Queensland a property qualification is required of the electors who choose the lower house, while in New South Wales there is no such limitation upon the suffrage. In South Australia

and Victoria both houses of the legislature are elected; in both a property qualification is required of the electors who choose the members of the upper house, and in Victoria a like qualification for membership of the upper house, also. In Victoria certain educational and professional qualifications are allowed to take the place of a property qualification. In each of the colonies the governor plays the part of a constitutional monarch, acting always upon the advice of ministers responsible to the popular chamber.

826. **The Powers of the Colonial Courts.** — The action of the courts in the colonies in certain questions furnishes an instructive counterpart to the constitutional functions of our own courts. The colonial governments are conducted under written constitutions as our own governments are, though their constitutions are imperial statutes while ours are drafted by conventions and adopted by vote of the people. And colonial courts exercise the same power of constitutional interpretation that belongs to our own courts and has often been carelessly assumed to be a peculiar prerogative of theirs. They test acts of legislation by the grants of power under which they are enacted, an appeal lying from them to the Judicial Committee of the Privy Council in England, which serves as a general supreme court for the colonies (secs. 736, 869).

The constitutionality of laws passed by the Dominion Parliament in Canada is considered first, of course, by the courts of the Dominion, going thence, if appealed, to the Privy Council.

827. **The Crown Colonies.** — All those colonies which have not responsible self-government are classed as Crown colonies, colonies more or less completely directed by the Colonial Office in London. They range in organization all the way from mere military administrations, such as have been established in St. Helena and Gibraltar, through those which, like Trinidad and the Straits Settlements, have both a nominated Executive and a nominated Legislative Council, and those like

Jamaica and Western Australia, whose nominated Executive is associated with a Legislative Council in part elected, to those like the Bahamas and Bermuda, in which the Councils are altogether elected, but which have no responsible ministry.

828. **Powers of Colonial Governors.** — It is interesting to have the testimony of one of the most capable and eminent of English colonial administrators as to the relative desirability of the post of governor in a colony in which he is governor indeed, with no ministers empowered to force their advice upon him, and in a colony where he must play the unobtrusive part of constitutional monarch. Lord Elgin says with great confidence, in his *Letters*, that his position as governor of Canada was a position of greater official power than his position, previously held, as governor of Jamaica. He declares his unhesitating belief that there is "more room for the exercise of influence on the part of the governor" in such a colony as Canada, where he must keep in the background and scrupulously heed his ministers, than under any other arrangement that ever was before devised, although his influence there is of course "wholly moral — an influence of suasion, sympathy, and moderation, which softens the temper while it elevates the aims of local politics."[1] This is but another way of stating the unquestionable truth that it is easier as well as wiser, to govern with the consent and co-operation of the governed than without it — easier to rule as a friend than as a master.

829. **India.** — India stands in matters of government, as in so many other respects, entirely apart from the rest of the British Empire. It is governed, through the instrumentality of its Governor-General and his Council, directly from London by a member of the Cabinet, the Secretary of State for India. The Secretary of State is assisted by a Council of fifteen members appointed by the Crown from among persons who have resided or served in India. Acting under the Secretary of State

[1] *Letters and Journals of Lord Elgin*, ed. by Theodore Walrond, Lond., 1872, p. 126.

and his Council in London, there is the Governor-General of India, who is also assisted by a Council, — a Council which is first of all administrative, but which, when re-enforced by from six to twelve additional members appointed by the Governor-General, has also the functions of a legislative council.

The work of the Governor-General's Council is divided among five departments, those, namely, of foreign affairs, finances, the interior, military administration, and public works; but these departments do not create a ministry; they are regarded simply as committees of the Council.

The members of the Council, six in number, besides a seventh so-called extraordinary member who is commander-in-chief of the forces, are appointed by the Crown. The sessions of the re-enforced or legislative council are held always in public.

830. Not all of India is directly administered by the English government: there are numerous native states, acting with substantial independence in local affairs, though under English overlordship and control. Such part of the vast territory as is administered directly by English officials is divided into eight provinces, of which the chief in importance are Madras and Bombay. The governors of Madras and Bombay are appointed by the Crown and are assisted, as the Governor-General is, by two councils, administrative and legislative. The Lieutenant-Governors of Bengal and the North West Provinces are appointed by the Governor-General and assisted by an administrative council only. The Lieutenant-Governors or Commissioners of the other provinces, who are also appointed by the Governor-General, are without councils.

831. **Greater Britain.** — Greater Britain, the world of English colonies, differs very materially from Greater Greece, the widespread Hellas of the ancient world. Hellas was disintegrate: the Greeks carried with them, as of course, Greek institutions, but only to allow those institutions wide differentiation; in no way did Greek settlement signify race integration, a national nexus of rule. Englishmen, on the contrary,

in English colonies, maintain a homogeneity and integration both of race and of institutions which have drawn the four parts of the world together under common influences, if they have not compacted them for a common destiny. Throughout Europe reformers have copied English political arrangements; the colonists have not copied them, they have extended and are perpetuating and perfecting them.

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XI.

THE GOVERNMENT OF THE UNITED STATES.

832. **The English Occupation of America.** — The political institutions of the United States are in all their main features simply the political institutions of England, as transplanted by English colonists in the course of the two centuries which preceded our own, worked out through a fresh development to new and characteristic forms. Though now possessing so large an admixture of foreign blood, a large majority of the people of the United States are still of British extraction; and at first the settlements of New England and the South contained no other element. In the far North, in what is now Canada, there were French settlements; in Florida there were colonists from Spain, and at the mouth of the Mississippi also there was a French population; the Dutch had settled upon the Hudson and held the great port at its mouth, and the Swedes had established themselves on the Delaware: all along the coast there was rivalry between the western nations of Europe for the possession of the new continent. But by steady and for the most part easy steps of aggression the English extended their domain and won the best regions of the great coast. New England, Virginia, and the Carolinas were never seriously disputed against them; and, these once possessed, the intervening foreigner was soon thrust out: so that the English power had presently a compact and centred mass which could not be dislodged, and whose ultimate expansion over the whole continent it proved impossible to stay. England was not long in

widening her colonial borders: the French power was crushed out in the North, the Spanish power was limited in the South, and the colonies had only to become free to develop energy more than sufficient to make all the most competed-for portions of the continent thoroughly English, — thoroughly Anglo-American.

833. **Adaptation of English Institutions.** — This growth of the English power in America involved as of course a corresponding expansion of English local institutions of government; as America became English, English institutions in the colonies became American: they adapted themselves, *i.e.*, to the new problems and the new conveniences of political life in separate colonies, — colonies struggling at first, then expanding, at last triumphing; and without losing their English character gained an American form and flavor.

834. It would be an utterly erroneous, an entirely reversed, statement of our colonial history to say that the English planted states in America: they planted small isolated settlements, and these settlements grew into states. The process, in other words, was from local, through state, to national organization. And not everywhere among the English on the new continent was the form of local government at first adopted the same: there was no invariable pattern, but everywhere, on the contrary, a spontaneous adjustment of political means to place and circumstance. By all the settlements alike English precedent was followed, but not the same English precedent; each colony, with the true English sagacity of practical habit, borrowed what was best suited to its own situation. New England had one system, Virginia another, New Jersey and Pennsylvania still a third, compounded after a sort of the other two.

835. **The New England Colonies.** — In New England the centre of government was always the town, with its church and schoolhouse and its neighborly cluster of houses gathered about these. The soil on the coast where the first settlers established

themselves was shallow and slow to yield returns even to hard and assiduous toil; the climate was rigorous, with its long winters and its bleak coast winds; every circumstance invited to close settlement and trade, to the intimate relationships of commerce and the adventures of sea-faring rather than to the wide-spreading settlements characteristic of an agricultural population.

836. The first New Englanders, moreover, were religious refugees. They had left the Old World to escape the Old World's persecutions and in order to find independence of worship; they were establishing a church as well as a community; they acted as organized congregations; their life was both spiritually and temporally organic. Close geographical association, therefore, such as was virtually forced upon them by the conditions of livelihood by which they found themselves constrained, accorded well with their higher social purposes. The church could be made, by such association, and accordingly was made, the vital nerve-centre of their union: the minister was the ruling head of the community, and church membership was in several of the settlements recognized as identical with citizenship.

837. **The Separate Towns.** — The several parts of the New England coast were settled by quite independent groups of settlers. There was the Plymouth colony at Plymouth, and altogether distinct from it, the Massachusetts Bay colony at Salem and Charlestown. To the south of these, founded by men dissatisfied with the Massachusetts government, were Portsmouth, Newport, and Providence, in what is now Rhode Island. On the Connecticut river other wanderers from Massachusetts built Hartford and Windsor and Wethersfield. Saybrook, at the mouth of the Connecticut river, was settled direct from England; so also was the colony of New Haven, on the coast of Long Island Sound west of the Connecticut. From year to year the planting of towns went diligently on: almost every town became the prolific mother of towns, which either sprang

up close about it and retained a sort of dependence upon it, or, planted at a distance, ventured upon an entirely separate life in the wilderness (secs. 115, 116, 118).

838. **Union of the Towns.** — Gradually the towns of each of the general regions mentioned drew together into the colonies known to later times, the colonies which were to form the Union. Plymouth merged in Massachusetts; Portsmouth, Newport, and Providence became but parts of Rhode Island; New Haven was joined to Connecticut. But at first these larger colonies were scarcely more than town leagues: each town retained unaltered its separate organization and a perfect independence in the regulation of its own local affairs. In Rhode Island, particularly, their jealousy of each other and their reluctance to expose themselves to anything like a loss of perfect autonomy long kept the common government which they most of the time maintained at a balance between union and dissolution. In the other New England colonies the same influences manifested themselves, though in a less degree. The town system which everywhere prevailed was by its nature an extremely decentralized form of government: government, so to say, came to a separate head in each locality: and the chief vitality was in these several self-governing units of each group rather than in the bonds which connected them with each other.

839. **Forms of Town Government.** — The form of town government was everywhere such as it was quite natural that Englishmen should have set up. The names of the town officers were borrowed from the borough governments at home, and their duties were, as nearly as circumstances warranted, the same as the duties of the officers whose names they bore. But the New England town was, at the same time, in many of its most important and most characteristic features, rather a reversion to older types of government than a transplanted cutting of the towns which the settlers had left behind them in the England of the seventeenth century. There was in it

of course none of the elaborated class privilege that narrowed the town governments of the England of that time. All the townsmen met in town meeting and there elected their officers: those officers were responsible to them and always rendered careful account of their actions to the body which elected them. Generally the most important of these officers were called Selectmen, — men selected by the town meeting to carry on the necessary public business of the community, — and these Selectmen stood in the closest relations of counsel and responsibility to the town meeting. In the earliest times the franchise was restricted, in Massachusetts and New Haven at least, to those who were church members, and many were excluded by this rule from participation in the government; but even under such circumstances there was real and effective self-government. The towns lacked neither vitality nor energy, for they did not lack liberty. In the late days when great cities grew up, the simple township system had to be abandoned in part; as the colonies expanded, too, they gained in energy and vitality as wholes, and their component parts, the towns, fell by degrees to a place of less exclusive importance in colonial affairs; but this basis of the township was never lost and is today still the foundation of local government in New England.

840. **Colonial Organization.** — As the towns came together into the groupings which constituted the later colonies other areas of government of course came into use. Townships were, for judicial purposes, combined into counties, and by various other means of organization a new nexus was given to the several parts of the now extended state. From the first the colonists had their "general courts," their central legislative assemblies representative of the freemen. To these assemblies went delegates from the several towns comprised in the colony. As the colonies grew, their growth but strengthened their assemblies: it was in the common ruling function of these that the union of the several parts of each colony was made real and lasting.

The sheriffs of the counties of colonial Massachusetts were appointed by the Governor. The development of the county organization brought into existence, too, Justices of the Peace who met in Quarter Sessions, afterwards called "General Sessions," and who were the general county authority quite after the fashion of the mother country.[1]

841. **The Southern Colonies.** — To this picture of the political institutions of colonial New England political and social organization in the Southern colonies offered many broad contrasts. The settlers in Virginia were not religious refugees: they had come out for a separate adventure in political, or rather in social, organization, but not for a separate venture in religion; and the coast they happened upon, instead of being rugged and bleak, was low and fertile, with a kindly climate, deep rivers, broad stretches of inviting country, and a generous readiness to yield its fruits in season. They had been sent out by a Company (the "Virginia Company" it was called) in England, to which the Virginia territory had been granted by the Crown, and they had no thought but to live under the governors whom the Company had placed over them. They founded Jamestown some hundred miles above the mouth of the James river; but Jamestown was in no way like the New England towns, and it soon became evident that town life was not to be the characteristic life of the colony. The rich soil invited to agriculture, the numerous rivers, full and deep, stood ready to serve as natural highways, and as the population of the colony increased it spread, — spread far and wide along the courses of the rivers.

842. **Expansion without Separation.** — Still there would appear to have been no idea of organic separation in this process, as there was so often in the spreadings of the New England colonists. Great plantations indeed grew up with an almost entirely separate life of their own, with their own wharves on

[1] See *Town and County Government in the English Colonies of North America*, by Edward Channing, Johns Hopkins University Studies in Historical and Political Science, 2d Series, pp. 40–42.

the river fronts and their own direct trade with the outer world by vessels which came and went between them and England, or between them and the trading colonies to the north; but all this took place without any idea of organic political separateness. This diffused agricultural population thus living its own life on the great rural properties which steadily multiplied in all directions still consciously formed a single colony, living at first under the general government of the Company which had sent out the first settlers, and afterwards, when the Company had been deprived of its charter and possessions, under the authority of royal governors. Its parts hung loosely together indeed, but they did not threaten to fall apart: the plan was expansion, not segregation.

843. **Southern Colonial Society.** — The characteristics of the society formed under such circumstances were of course very marked. Slaves were early introduced into the colony, and served well to aid and quicken the development of the plantation system. A great gap speedily showed itself between the owners of estates and the laboring classes. Where slavery exists manual toil must be considered slavish and all the ideas on which aristocracy are founded must find easy and spontaneous rootage. Great contrasts of condition soon appeared, such as the more democratic trading communities of New England were not to know until the rise of the modern industrial organization; and the governing power rested of course with the powerful, the propertied classes.

844. **Government of Colonial Virginia.** — The government of colonial Virginia bore, in all its broader features, much the same character as the rural government of England. Organization was effected through a machinery of wide counties, instead of by means of compacted townships. There was at the head of each county, under this first order of things, a Lieutenant whose duties corresponded roughly with those of the Lords Lieutenant in England. The other important executive officer of the county, too, in Virginia as in England,

was the Sheriff. The Lieutenant was appointed by the Governor, was chief of the military (militia) organization of the county, and, by virtue of his membership in the Governor's Council, exercised certain judicial functions in the county. The Sheriff also was appointed by the Governor, upon the nomination of the Justices of the county. His duties an English sheriff would have regarded as quite normal. And added to these officers there was, as in England, a "commission of the peace," a body of justices or commissioners authorized to hold county court for the hearing of all ordinary cases not of grave import; authorized to levy the county taxes, to appoint surveyors of highways, to divide the county into precincts; empowered to act as the general administrative authority of the county in the management of all matters not otherwise assigned. The Episcopal church had the same official recognition in Virginia as in England and contributed the same machinery, — the machinery of the Vestry, — to local government. Even the division of the 'hundred' was recognized, so close was the outline likeness between the institutions of the mother country and those of her crude child in the west. The system was undemocratic, of course, as was its model: "the dominant idea," as Mr. Ingle says, "was gradation of power from the Governor *downward*, not upward from the people."[1] The Justices, like the other officers of the county, were appointed by the Governor, and held only during his pleasure: the whole system rested upon a rather absolute centralization. But still there was liberty. There was strong local feeling and individual pride to counteract the subserviency of the officers: those officers showed a more or less self-respecting independence in their administration; and at least the spirit of English self-government was kept alive.

[1] *Local Institutions in Virginia*, by Edward Ingle, Johns Hopkins University Studies in Historical and Political Science, 3d Series, p. 97 (continuous, p. 199).

845. **Virginia's Colonial Assembly.** — The vital centre of the political life of the colony was her representative assembly. So early as 1619, but twelve years after the foundation of the colony (1607), the Virginia Company, then still in control, had called together in the colony, through its governor, an assembly representing the plantations then existing, which were in this way treated as independent corporations entitled to a representative voice in colonial affairs. Later years saw the Assembly developed upon the basis of a representation by towns, hundreds, and plantations: and even after the governors sent out by the Company had been supplanted by royal governors this representative body, this House of Burgesses, as it came to be styled, continued to exist, and to wax strong in control. The first Assembly, that of 1619, had sat in joint session with the governor and his council, but the more fully developed assembly of later times sat apart as a distinct and independent body. It was this elective representation in the government of the colony which made and kept Virginia a vital political unit, with a real organic life and feeling.

846. **The constitutions of the other southern colonies** corresponded in all essential features with the constitution of Virginia. They, too, had the county system and the general representation in a central assembly, combined with governors and councils appointed by the Crown. All save Maryland. Her constitution differed from the others mainly in this, that in place of the king stood a 'proprietor' to whom the fullest prerogatives of government had been granted.

847. **The Middle Colonies** had a mixed population. New York had been New Netherland, and the Delaware had been first settled by the Swedes and then conquered by the Dutch. When the territory, which was to comprise New York, New Jersey, Delaware, and Pennsylvania, fell into the hands of the English the foreign element was not displaced but merely dominated; and to a large extent it kept its local peculiarities of institution. For the rest, the English settlers of the region

followed no uniform or characteristic method of organization. The middle colonies, though possessed of a rich soil, had also fine seaports which invited to commerce; their climate was neither so harsh as that of New England, nor so mild and beguiling as that of the southern colonies. Their people, consequently, built towns and traded, like the people of New England; but also spread abroad over the fertile country and farmed, like the people of Virginia. They did these things, however, without developing either the town system of New England or the plantation system of Virginia. Townships they had, but counties also; they were simple and democratic, like the New Englanders, and yet they were agricultural also, like the Virginians: in occupation and political organization, as well as in geographical situation, they were midway between their neighbors to the north and south.

848. **The Charters: Massachusetts.** — The political relations of the colonies to the mother country during the various developments of which I have spoken were as various as the separate histories of the colonies. The three New England colonies, Massachusetts, Rhode Island, and Connecticut, possessed charters from the king which virtually authorized them to conduct their own governments without direct interference on the part of the Administration at home. During the first years of English settlement on the American coast it had been the practice of the government in England to grant territory on the new continent to companies like the Virginia Company of which I have spoken, — grants which carried with them the right of governing the new settlements subject only to a general supervision on the part of the home authorities. The colony of Massachusetts Bay was established under such an arrangement: a Company, to which special privileges of settlement and government had been granted, sent out colonists who founded Salem and Boston; but the history of this Company was very different from the history of the Virginia Company. The Virginia Company tried to manage their colony

from London, where the members of the Company, who were active liberals and therefore not very active courtiers, presently got into trouble with the government and had both their charter and their colony taken away from them. The Massachusetts Company, on the other hand, itself came to America, and, almost unobserved by the powers in London, erected something very like a separate state on the new continent. Its charter was received in 1629; in 1630 it emigrated, governor, directors, charter, and all, to America, bringing a numerous body of settlers, founded Boston and Cambridge, and put quietly into operation the complete machinery of government which it had brought with it. It created not a little stir in official circles in England when it was discovered that the Company which had been given rights of settlement on the New England coast had left the country and was building a flourishing semi-independent state on its territories; but small colonies at a great distance could not long retain the attention of busy politicians in London, and nothing was done then to destroy the bold arrangement. Fatal collision with the home government could not, however, it turned out, be permanently, or even long avoided by the aggressive, self-willed rulers of the Massachusetts Company. Many of the laws which they passed did not please the Crown, — particularly those which set up an exclusive religion and tolerated no other; they would not change their laws at the Crown's bidding; and, though the evil day was postponed, it came at last. In 1684 the contest between Crown and colony came to a head, and the charter of the Massachusetts Company was annulled. Before a change could be effected in the government, indeed, the king, Charles II., died, and during the troublous reign of James II. the colonists quietly resumed their charter privileges; but in 1692 the government of William and Mary was ready to deal with them, and a new form of colonial organization was forced upon them. They were compelled to take a governor from the king; the royal governor appointed the judicial officers of the colony and

controlled its military forces; and, although the colonists retained their assembly and through that assembly chose the governor's Council, the old charter privileges were permanently lost.

849. **The Connecticut Charter.** — Rhode Island and Connecticut were small and more fortunate. The town of Saybrook, at the mouth of the Connecticut river, had been founded under a charter granted to two English noblemen, and consisted, therefore, of immigrants direct from England; but Saybrook did not grow rapidly and proved a comparative failure. The successful and dominant settlement on the Connecticut was that which had been founded higher up the river at Hartford by men from Massachusetts who had neither charter nor any other legal rights, but who had simply come, settled, and made a written constitution for themselves. New Haven, westward of the river on the shore of the sound, had been established by a band of English immigrants equally without charter rights, but equally ready and able to construct a frame of government for themselves. Some thirty years after their settlement, the leaders of the 'Connecticut colony,' up the river, which meantime had become an extended cluster of towns, decided that it was time to obtain a charter. Accordingly they sent their governor, Winthrop, to England to procure one. He was entirely successful, much more successful than was pleasant to the settlers of the New Haven district; for he had obtained a grant which included their lands and colony and which thus forced them to become a part of 'Connecticut.' Saybrook had already been absorbed. The charter gave the colonists substantially the same rights of self-government that they had had under their own written constitution, adopted upon their first settlement; it was, in other words, just such a charter as Massachusetts then enjoyed. And, unlike Massachusetts, Connecticut kept her charter, kept it not only through colonial times to the Revolution, but made it at the Revolution her state constitution, and was content to live under it until

1818. Her shrewdness, her arts of timely concession, and her inoffensive size enabled her to turn away from herself each successive danger of forfeiture.

850. **Rhode Island's Charter.** — Rhode Island was similarly protected by fortune and sagacious management. Roger Williams, the energetic leader of settlement in that region, obtained a charter from Parliament in 1644, which was confirmed in 1654, and replaced by a new charter, from Charles II., in 1663, the year after Connecticut obtained its legal privileges through the instrumentality of Winthrop. As New Haven and Connecticut were joined by Winthrop's charter, so were the towns of the Rhode Island country united by the charters obtained by Williams, under the style 'Rhode Island and Providence Plantations,' — a title which is still the full official name of the state. The charter of '63 was retained by the people of Rhode Island even longer than the people of Connecticut retained theirs. It was not radically changed until 1842.

851. **Proprietary Governments.** — The governments of almost all the other colonies were at first 'proprietary'; those of Maryland, Pennsylvania, and Delaware remained proprietary until the Revolution. Maryland was granted to the Calverts, Lords Baltimore; Pennsylvania and Delaware were both included in the grant to William Penn; New York was bestowed upon James, Duke of York, upon whose ascension of the throne, as James II., it became an immediate province of the Crown; New Jersey, originally a part of New York, was first bestowed by the Duke of York on Lord John Berkeley and Sir John Carteret, was afterwards divided, then sold in part, and finally surrendered to the Crown (1702); the Carolinas and Georgia in the same way, given at first to proprietors, passed very soon into the hands of the royal government. New Hampshire, after several attempts to unite with Massachusetts, fell quietly into the status of a royal colony, without having had either a charter or a proprietary stage of existence.

852. Government under proprietors meant simply government by governors and councils appointed by the proprietors, with in all cases a full right on the part of the people to control the government through representative assemblies. The private proprietors, like the great public proprietor, the Crown, granted charters to their colonies. The charter which Penn bestowed upon Pennsylvania is distinguished as one of the best-conceived and most liberal charters of the time; and under it his colony certainly enjoyed as good government as most of the colonies could secure.

853. **Direct Government by the Crown,** which came in turn to every colony except Rhode Island, Connecticut, Maryland, Pennsylvania, and Delaware, involved the appointment of governors by the Crown, and also, everywhere except in Massachusetts, the appointment of the governor's council. It generally involved also the dependence of the colonial judiciary, and in general of the whole administrative machinery of government, upon the royal will; but it, nevertheless, did not exclude the colonists from substantial powers of self-government. Everywhere legislators disciplined governors with the effective whip of the money power, and everywhere the people grew accustomed to esteem the management of their own affairs, especially the control of their own taxes, matter-of-course privileges, quite as inalienable rights of Englishmen in America as of Englishmen in England.

854. **Development of the Assemblies.** — It was, indeed, as a matter of course rather than as a matter of right that the powers of the colonial assemblies waxed greater and greater from year to year. Parliament would have been wise to continue the policy of neglect which had been the opportunity of the colonies in the development of their constitutional liberties. Left to themselves, they quickly showed what race they were of.

As Burke said, in their justification, they "had formed within themselves, either by royal instruction or royal charter, assemblies so ex-

ceedingly resembling a parliament, in all their forms, functions, and powers, that it was impossible they should not imbibe some opinion of a similar authority.

"At the first designation of these assemblies, they were probably not intended for anything more (nor perhaps did they think themselves much higher) than the municipal corporations within this island, to which some at present love to compare them. But nothing in progression can rest on its original plan. . . . Therefore, as the colonies prospered and increased to a numerous and mighty people, spreading over a very great tract of the globe, it was natural that they should attribute to assemblies so respectable in their formal constitution some part of the dignity of the great nations which they represented. No longer tied to by-laws, these assemblies made acts of all sorts and in all cases whatsoever. They levied money, not for parochial purposes, but upon regular grants to the crown, following all the rules and principles of a parliament, to which they approached every day more and more nearly. . . . Things could not be otherwise; and English colonies must be had on these terms, or not had at all. In the meantime neither party felt any inconvenience from this double legislature,[1] to which they had been formed by imperceptible habits, and old custom, the great support of all the governments in the world. Though these two legislatures were sometimes found perhaps performing the very same functions, they did not very grossly or systematically clash. . . . A regular revenue, by the authority of Parliament, for the support of civil and military establishments, seems not to have been thought of until the colonies were too proud to submit, too strong to be forced, too enlightened not to see all the consequences which must arise from such a system."[2]

855. In such assertions of a right of parliamentary self-government it might be expected that the charter colonies would be most forward; but, as a matter of fact, such was not the case. Massachusetts was ever, indeed, very stubbornly and heroically attached to her liberties, but the royal colony of Virginia was not a whit behind her. The assemblies of the royal colonies, no less than those of the charter governments, early, and as if by an instinct and habit common to the race, de-

[1] The legislature of England, *i.e.*, and a colonial legislature.

[2] "Letter to the Sheriffs of Bristol," *Works* (ed. Boston, 1880), Vol. II., pp. 232, 233.

veloped a consciousness and practice of local sovereignty, which comported well enough, indeed, with perfect loyalty, which was long-suffering as towards Navigation Acts and all interferences by the mother country with the external relations of the colonies, their place in the politics and commerce of the outside world, but which was from the first prompt to resent and resist all dictation as to the strictly interior affairs of the settlements. And the same was true of the proprietary colonies, also: Maryland assumed the same privileges that Virginia insisted upon enjoying, and even Pennsylvania, with its population compounded of English, Dutch, and Swedes, manifested not a little of the same spirit of independent self-direction.

856. **Development of Constitutional Liberty in the Colonies.** — There was, therefore, a comparatively uniform development of constitutional liberty throughout the colonies. Everywhere the same general causes were operative. The settlement and development of a new country gave to the elective governing bodies of the colonies a wide and various duty of legislative regulation; the newness of the country created everywhere substantially the same new conditions of social relationship; everywhere, and more and more as the years went on, there was a very general participation in communal and colonial affairs by the mass of the people most interested: democratic institutions brought in their train equality of law and a widespread consciousness of community of interest. Each colony grew the while more and more vividly conscious of its separate political personality in its relations with the other colonies and with the ruling powers in England.

857. **Political Sympathy of the Colonies.** — The substantial identity of the lines of institutional development in the several colonies appears in nothing more clearly or conclusively than in their close and spontaneous alliance against England at the Revolution. Despite very considerable outward differences of social condition and many apparent divergencies

of interest as between colony and colony, they one and all *wanted the same revolution:* almost without hesitation they ran together to co-operate by the same means for the same ends; they did not so much *make* a common cause as *have* a common cause from the first. The real concrete case of revolution, so to say, was made up between England and Massachusetts: to the politicians in the mother country it seemed possible to divide the colonies on grounds of self-interest: apparently colonies so utterly different in every outward aspect, so strongly contrasted in actual economic condition as Massachusetts and Virginia, could easily be played off against one another. But we now know how little foundation of fact such a view had. Boston's trade was offered to Salem, her commercial rival, as a bait to catch Salem's acquiescence in the iniquitous Boston Port Bill which shut Boston off from all trade; but Salem would not have it: what was to prevent similar treatment of herself in the future? More striking still, distant Virginia sounded the call to revolution in behalf of Massachusetts: the contest was *political*, she clearly perceived, not economical, — a contest of principle, not a contest for any temporary interest or momentary advantage; from the point of view of politics Massachusetts' quarrel was Virginia's also. Virginia spoke at once, therefore, and as a leader, for combination, for a joint resistance to the aggressions of the home government, and at length for independence and a perpetual union between the colonies. For the shortest possible time did the struggle remain local; immediately it became 'continental.'

858. **American as compared with English Constitutional Development.** — There was in this development of self-government in America a certain very close resemblance to the development of self-government in England; but there were also other points of very strong and obvious contrast between the institutional histories of the two countries. Both in England and America the process of institutional growth was in the same direction: it began with small, hardy, deep-rooted local insti-

tutions, with small self-directing communities, and widened from these to national institutions which bound the constituent communities together in a strong and lasting central union. England began with her village communities and her judicial 'hundreds,' with the primitive communal institutions of the Teutonic folk; these were first gathered to a head in the petty kingdoms of the days of the Saxon Heptarchy; another step, and these one-time petty kingdoms were merely the counties of a wider union, and England was ready for the amalgamation of the Norman rule, was ready for the growth of her parliaments and her nationality. In like manner, the United States began with isolated settlements upon a long coast, settlements separate, self-contained, self-regulative; these in time merged in numerous petty colonial states; and finally these colonial states fitted themselves together into a national union.

859. **Process of Growth in America Federation, in England Consolidation.** — But the means of integration were in the two cases quite diverse. American integration has been federal; English, absorptive, incorporative. The earlier stages of federation did not appear in the southern colonies; because there the unity of the first settlement was generally not broken; the Virginia of the Revolution was but an expansion of the Jamestown settlement; growth by agricultural development was not disintegrating like growth by town establishment. But in New England the process is obviously federative from the first, finding its most perfect type, probably, in Rhode Island, whose town atoms drew so slowly and reluctantly together and so long stoutly resisted the idea that they had in any sense been absorbed or subordinated under the operation of the charters of 'Rhode Island and Providence Plantations.' What was at first mere confederation between these smallest units, however, by degrees became virtual coalescence, and the absorbed towns finally formed but subordinate parts in the new and larger colonial units which drew together in the Continental Congresses. Between these larger units, these full-grown colonial

states, of course, union was from the first distinctly federative, matter of concession and contract. They were united in entirely voluntary association, as of course the Saxon kingdoms were not.

860. **Conscious Development of Institutions in America.** —Throughout their development, therefore, the colonies presented, in still another equally important respect, a marked contrast to English development in this, that the formulation of their institutions was conscious and deliberate. The royal colonies, like the proprietary and the charter colonies, exercised their rights of self-government under written grants of privilege from the Crown: their institutions grew within the area of written constituent law; from the first they had definite written 'constitutions' wherein the general fabric of their governments was outlined. Constitution by written law, therefore, became very early one of the matter-of-course habits of colonial thought and action. When they cast off their allegiance to Great Britain their self-constitution, as independent political bodies, took the shape of a recasting of their colonial constitutions simply; Rhode Island and Connecticut, as we have seen, did not even find it necessary to change their charters in any important particular: they already chose their own governors and officials as well as made their own laws. The other colonies, with little more trouble, found adequate means of self-government in changes which involved hardly more than substituting the authority of the people for the authority of the English Crown. But the charter, the written constituent law, was retained as of course: the new governments had their charters which emanated from the people, as the old governments had had theirs given by the king. Popular conventions took the place of the Privy Council. The colonists were not inventing written constitutions; they were simply continuing their former habitual constitutional life.

861. **English Law and Precedent.** — Whatever the form of colonial institutions, however, their substance and content were

thoroughly English. In a sense, indeed, even the forms of colonial constituent law may be said to have been English, since it was English practice which originated the idea and habit of giving written grants of privilege to distant colonies. The colonial law of Canada and Australia stands to-day in much the same relation to the law of the mother country that the law of the American colonies bore to the law which created them (sec. 826). Within the constitutions of the colonial and revolutionary time, at any rate, English law and precedent were closely followed. The English common law has gone with Englishmen to the ends of the world: the English communities in America were but projected parts of the greater English community at home; the laws of private and personal relation which obtained in England were recognized and administered also in the colonies; and when, at the time of the Revolution, the colonists developed out of their charters the constitutions under which they were to live as independent commonwealths their first care was to adopt this common law under which they had always acted. Important modifications were made indeed in the law thus adopted. It was purged of all class privilege, of all church prerogative, of all things incompatible with the simple democratic society of the new world; but no real break was made with the principles of English legal precedent and practice.

862. Quite as naturally and quite as completely was English practice adhered to in the public law of the colonies and of the independent commonwealths into which they grew. The relations of the colonial legislatures with the colonial governors were just the relations of King and Parliament reproduced on a small scale, but with scarcely less earnestness and spirit. In all respects, except that of the erection of a responsible ministry representing and shielding the Executive, the relations of the people to their governments remind of English precedent. The powers of the executive were, in small, the powers of the Crown. The courts were constituted as the English courts

were, and followed the same rules of procedure. Of course the English in America, being men of the same practical political race as Englishmen in England, struck out not a few lines of development of their own in suiting their institutions to the daily needs of a new civilization and to novel conditions of social organization; American politics were not long in acquiring in many respects a character peculiarly their own. But the manner of development was English throughout: there was nowhere any turning of sharp corners: there was nowhere any break of continuity: to the present day our institutions rest upon foundations as old as the Teutonic peoples.

863. **Union: Preliminary Steps.** — How much of political precedent that was their own the colonists had developed appeared most distinctly when they came to put the timbers of their Union together in the days succeeding the Revolution. The colonies cannot be said to have framed any federative constituent law until 1777, when the Articles of Confederation were drawn up. Before that time they had co-operated without any determinate law of co-operation, acting rather upon the suggestions of international procedure than upon any clear recognition of corporate combination. Preparations for union there had been, and signs of its coming; but no more. For a period of forty years following the year 1643 the New England colonies had held together in loose confederation against the Indians; in 1754 colonial delegates who had met at Albany for conference with representatives of the Six Nations discussed a premature plan of union; in 1765 delegates from nine of the colonies met at New York and uttered in behalf of all English Americans that protest against taxation by Parliament which gave the key-note to all the subsequent thought of the revolutionary movement; and in 1774 sat the first of the series of 'Continental Congresses' with which began American union. But in none of these steps was there any creation of organic union: that was to be the result of slow processes, and was to be effected only by the formulation of an entirely new body of law.

864. **Separateness of the Colonial Governments.** — It is very important, if a just view is to be formed of the processes by which the Union was constructed, to realize the complete separateness of the governments of the colonies. They all held substantially the same general relation to the English authorities; they had a common duty as towards the distant country from which they had all come out; but they were not connected by any bonds of government on this side the sea. Each of the colonies had its own separate executive officials, legislature, and courts, which had no connection whatever with the officers, legislatures, and courts of any other colony. Their co-operation from time to time in meeting dangers which threatened them all alike was natural and spontaneous, but it was intermittent; it rested upon mere temporary necessity and had no basis of interior organic law. The colonists had many grounds of sympathy. Besides possessing the same blood and the same language, they entertained the same ideas about political justice; their dangers, whether proceeding from aggressions on the part of the French and Indians which threatened their lives, or from aggressions by Parliament which threatened their liberties, were common dangers: they were one and all equally interested in the successful development and liberal government of the new country with which they had identified themselves. But the motive of their endeavors was always the preservation of their internal and separate self-government; their liberties were historically coincident with their organization and rights as separate governments. It was, therefore, only by the slow processes of a hard experience of the fatal consequences of any other course that the colonies were brought to subordinate themselves to a central authority which could go further than mere conference and command them. They saw from the first the necessity for co-operation, but they did not see from the first the absolute necessity for union. Very slowly, considering the swift influences of revolution amidst which they worked, and very reluctantly, considering the evident dangers of separation which daily looked them in the face, did they construct the union which was to deprive them of the fulness of their loved independence.

865. **The Confederation.** — It was not until 1781 that a foundation of distinct written law was put beneath the practice of union; it was not till 1789 that the law of the union was made organic. In 1781 the Articles of Confederation were finally adopted which had been proposed by the Continental Congress of 1777: but these Articles gave no real integration

to the constituent states: they were from the first a rope of sand which could bind no one. They did little more than legitimate the Continental Congress. Under them the powers of the Confederation were to be exercised by its Congress; its only executive or judicial organs were to be mere committees or agencies of the Congress; and it was in fact to have no real use for executive parts, for it was to have no executive rights. Its function was to be advice, not command. It hung upon the will of the states, being permitted no effective will of its own. The Articles were scarcely more than an international convention.

866. **The Articles of Confederation** formally vested the exercise of federal functions in a Congress just such as the Continental Congresses had been, — a Congress, that is, consisting of delegates from the several states, and in whose decisions the states were to have an absolutely equal voice. No state, it was arranged, should have her vote in the Congress unless represented by at least two delegates, and no state, on the other hand, was to be entitled to send more than seven delegates; whether she sent two or seven, however, her vote was to be single vote, upon which her delegates were to agree. The government thus constituted was officially known as "The United States in Congress assembled." For the exercise of representative functions it was very liberally and completely equipped. To it the independence of the several states in dealing with foreign powers was entirely subordinated. It alone was to conduct all international correspondence and sanction all international agreements; it was to control the army and navy of the Confederation; it was to preside over federal finances, doing all borrowing and all spending that might be necessary for the purposes of the common government; it was to determine the value of current coin and the standards of weights and measures; it was to be arbitrator in disputes between the states; in brief, it was to be the single and dominant authority for all the graver common interests of the constituent states: its representative position was eminent and complete.

867. **Weakness of the Confederation.** — But it was given absolutely no executive power, and was therefore helpless and contemptible. It could take no important resolution without the difficult concurrence of nine states, — a concurrence made all the more difficult by the fact that the removal of the pressure of the war with England very greatly abated the interest of the states in the functions of the central Con-

gress, and led some of them again and again to fail to send delegates to its sessions; its chief executive agency was a committee of its members representing all the states (hence called the "Committee of States") and bound by the same hard rule of obtaining the concurrence of nine of its thirteen members to every important executive step; and, above all, its only power to govern the states was a power to advise them. It could ask the states for money, but it could not compel them to give it; it could ask them for troops, but could not force them to heed the requisition; it could make treaties, but must trust the states to fulfil them; it could contract debts, but must rely upon the states to pay them. It was a body richly enough endowed with prerogatives, but not at all endowed with powers. "The United States in Congress assembled" formed a mere consultative and advisory board.

868. **Need of a Better Union.** — It was the fatal executive impotency of the Confederation which led to the formation of the present stronger and more complete government. The old Continental Congresses had sufficed, after a fashion, to keep the colonies together so long as the pressure of the war continued; throughout that war there had been, despite much indifference now and again on the part of some of the colonies to their duty, and of not a little positive dereliction of plain obligations, a wonderful degree of energy and unity of action among the confederated colonists. But when the pressure of the war was removed there was an ominous access of indifference, an ill-boding decrease of respect for plighted faith between the states. Signs fast multiplied both of the individual weakness of the states and of the growth of threatening jealousies between them. A war of tariffs began between neighbor states on the seaboard, notably between New York and New Jersey and between Virginia and Maryland. In Massachusetts there flared out, by reason of the poverty engendered by the war, a rebellion of debtors under Daniel Shays which it was for a moment feared the state authorities might find it hard to cope with. It speedily became evident that, both for the sake of internal order and of inter-state peace and goodwill, a real central government was needed. Central consultation would not suffice;

there must be central government. The Confederation, therefore, was no real advance upon the old Continental Congresses. Before a single decade had passed over the new government with its fair-spoken Articles a new union had been erected and the real history of the United States begun.

869. **The Constitution: Colonial Precedents.** — The present Constitution erects a very different government: it is the charter of a federal state, which has a commanding law and an independent power of its own, whose Constitution and law are the supreme law of the land. The Convention which framed the new constitution met in Philadelphia in May, 1787, and fused together over the slow fires of prolonged debate the elements of English and colonial precedent which were to constitute the government of the United States. In the debates of that Convention during that memorable summer are to be read the particulars of the translation of English precedent into American practice made during the formative colonial period. Through the instrumentality of the able men who composed that extraordinary assembly, the government of the United States was fitted out with the full experience of the colonies and of the revolutionary states.[1] It was arranged that the legislature of the new federal government should consist of two houses, not in direct imitation of the English system, whose House of Lords we did not, of course, have the materials for reproducing, but in conformity with an almost universal example set by the states. A single state furnished the precedent in accordance with which a real difference of character was given to the two houses. The lower house of the Connecticut legislature was constituted by an equal represen-

[1] In describing the work of the Convention I follow here Professor Alexander Johnston's clear exposition given in the *New Princeton Review* for September, 1887, under the title "The First Century of the Constitution." A convenient brief survey of the chief features of the state constitutions at the time of the formation of the present government of the Union may be found in Hildreth, Vol. III., Chap. XLIV.

tation of the towns of the state, while her upper house represented her people at large: and Connecticut's example showed the Convention a convenient way of compromise by which they could reconcile the two parties within it which were contending, the one for an equal representation of the states in Congress after the absolute manner of the Confederation, the other for a proportional representation of the people simply. The Senate, it was agreed, should represent the states equally, the House of Representatives the people proportionally. The names Senate and House of Representatives were to be found already in use by several of the States. The single Executive, the President, was an obvious copy of the state governors, many of whom at that time bore the name of president; his veto power was to be found formulated ready to hand in the constitution of New York: a method of impeachment was already prepared in the constitutions of half a dozen states. Several states had also the office of Vice-President. With a fine insight into the real character of the government which they were constructing, the Convention provided that its judiciary should be placed, not under the President or the houses, but alongside of them, upon a footing of perfect equality with them, and that with it, as a co-ordinate branch of the government, should rest the weighty prerogative of passing upon the constitutionality of all laws. A similar arrangement obtained under the state constitutions, but the function of constitutional interpretation was necessarily as old as written charters and constitutions, had been an inevitable corollary to their fundamental proposition of a gift of limited powers. Written constituent law is by its very nature a law higher than the legislature acting under it can enact, and by that law, as by an invariable standard, must the courts test all acts of legislation.[1] The colonial courts had often upon this principle questioned the validity of colonial legislation, and the Supreme Court of

[1] See A. V. Dicey, *The Law of the Constitution*, Chap. III.; and J. Bryce, *The American Commonwealth*, Chap. XXIII.

the United States had long had a prototype in the Judicial Committee of the Privy Council, whose function it was to hear appeals from the colonies, and whose practice it had been to pronounce against all laws incompatible with the royal charters (secs. 736, 826).

870. When they came to equip Congress with powers, the Convention adopted the plan of careful enumeration: it set out the acts of government which were to be permitted to the legislature of the new government in a distinctly cast list of eighteen items. Even in doing this, however, they may be said to have been simply recording the experience of the Confederation: they were giving Congress the powers for lack of which the Congress of the Confederation had proved helpless and ridiculous. It was only when they came to construct the machinery for the election of the President that they left the field of American experience and English example and devised an arrangement which was so original that it was destined to break down almost as soon as it was put in operation.

871. This general statement of the broader features of the selective work of the Convention will suffice for the present; other more particular references to state precedent and experience may be made in their proper connections in our further discussion of the government. I wish in these paragraphs only to fix the attention of the student, by way of clarifying preparation, upon the instructive fact that the work of the Convention was a work of selection, not a work of creation, and that the success of their work was not a success of invention, always most dangerous in government, but a success of judgment, of selective wisdom, of practical sagacity, — the only sort of success in politics which can ever be made permanent.

872. **Character of the New Government.** — It is one of the distinguishing characteristics of the English race whose political habit has been transmitted to us through the sagacious generation by whom this government was erected that they have never felt themselves bound by the logic of laws, but only by a practical understanding of them based upon slow precedent. For this race the law h they live is at

any particular time *what it is then understood to be;* and this understanding of it is compounded of the circumstances of the case. Absolute theories of legal consequence they have never cared to follow out to their conclusions. Their laws have always been used as parts of the practical running machinery of their politics, — parts to be fitted from time to time, by interpretation, to existing opinion and social condition.

873. **Character of the Government Changes with Opinion.** — It requires a steady, clear-viewed, thoroughly informed historical sense, therefore, to determine what was at any given time the real character of our political institutions. To us of the present day it seems that the Constitution framed in 1787 gave birth in 1789 to a national government such as that which now constitutes an indestructible bond of union for the states; but the men of that time would certainly have laughed at any such idea, — and for the English race, as I have said, every law is what those who administer it think that it is. The men of 1789 meant to form "a more perfect union" than that which had existed under the Confederation: they saw that for the colonies there must be union or disintegration; they thought union needful and they meant to have it in any necessary degree. But they had no special love for the union which they set about consummating, and they meant to have as little of it as possible, — as little as might be compatible with wise providence as to the welfare of the new-fledged states. They were even more afraid of having too strong a central government than of having one which was too weak, and they accepted the new constitution offered them by the Convention of 1787 because convinced of the truth of the arguments urged by its friends to the effect that the union would be federal merely and would involve no real sacrifice of individuality or autonomy on the part of the states.

874. **Early Sentiment towards the Union.** — It is astonishing to us of this generation to learn how much both of hostility and of indifference was felt for the new government,

which we see to have been the salvation of the country. Even those who helped make it and who worked most sincerely for its adoption entertained grave doubts as to its durability; some of them even questioned, in despondent moments, its usefulness. Philosophic statesmen like Alexander Hamilton supported it with ardent purpose and sustained hope; but for the average citizen, who was not in the least degree philosophic, it was at first an object of quite unexciting contemplation. It was for his state, each man felt, that his blood and treasure had been poured out: it was that Massachusetts and Virginia might be free that the war had been fought, not that the colonies might have a new central government set up over them; patriotism was state patriotism. The states were living, organic persons: the union was an arrangement, — possibly it would prove to be only a temporary arrangement; new adjustments might have to be made.

875. **Early Tolerance for Threats of Secession.** — It is by this frame of mind on the part of the first generation that knew the present constitution that we must explain the undoubted early tolerance for threats of secession. The Union was too young to be sacred; the self-love of the states was too pronounced to be averse from the idea that complete state independence might at any time be resumed. Discontent in any quarter was the signal for significant hints at possible withdrawal. As the new system lived on from year to year and from year to year approved itself strong and effective it became respected; as it gathered dignity and force regard was added to respect, until at last the federal government became a rallying centre for great parties moved by genuine national sentiment. But at first neither love nor respect shielded the federal authorities from the jealousies and menaces of the states. The new government was to *grow* national with the growth of a national history and a national sentiment.

876. **Growth of the National** The career and fate of the Federalist Party first state of

opinion concerning the Union. The Federalist party was the party of the Constitution, — the party which had been chiefly instrumental in bringing about the adoption of the new frame of government. Immediately upon the inauguration of the present Union this party of its friends was put in charge of the new central body politic. It presided over the critical period of its organization, and framed the first measures which gave it financial credit, international consideration, security, and energy. But it soon became evident that the Federalists held views as to the nature of the new government which not all of those who had voted for the adoption of the Constitution were willing to sanction. They assumed for the federal authorities prerogatives of too great absoluteness, and seemed to not a few to be acting upon the idea that the purpose of the Constitution was to subordinate, and if need be sacrifice, state interests to the interests of the general government. Very speedily, therefore, they brought a reaction upon themselves, and were displaced by a party which felt that the limitations put by the Constitution upon federal authority ought to be very strictly observed. This new party, calling itself 'Democratic-Republican,' may be said to have been created by the injudicious excesses of the Federalists; and from this point of view the Federalist party may be said to have effected its own destruction. After its first national defeat it never again came into power. Rapidly in some places, slowly in others, it went utterly to pieces.

877. But, although the Federalist party was destroyed, time worked in favor of its political conceptions. The Democratic-Republicans soon found that success in conducting the affairs of the federal government was, even for them, conditioned upon very liberal readings of the authority conferred by the Constitution; and by slow degrees they drifted into practices of 'broad construction' quite as abhorrent to their own first principles as the much-berated measures of the Federalists had been. But the Democratic-Republicans, — or the Demo-

crats, as they were before long more briefly described, — had the advantage of a corresponding change in public opinion. That, too, was steadily becoming nationalist in its tendencies.

878. **Railroads, Expansion, and War aid the National Idea.** — So long as the people of one section of the country saw little or nothing of the people of the other sections, separateness of feeling and localness of view continued to exist and to exercise a controlling force; the majority of the people continued to put the states before the nation in their thoughts and to demand more or less punctilious regard for state prerogatives. But when railroads began to be built and to multiply; when people from all parts of the Union began to go out and settle the West together; when seeing each other and trading with each other began to make the people of all the states very much alike in most of the greater things of habit and institution, and even in most of the smaller things of opinion and conduct; when new states which had grown up in the West without any of the old conservative colonial traditions began to be admitted to the Union in increasing numbers, regarding themselves as born in and of the Union; when a second war with England and a hot struggle with Mexico had tested the government and strengthened a sentiment of national patriotism, — then at length it began to be very generally thought that the Federalists had been right after all; that the federal government ought to come first in consideration, even at the cost of some state pride.

879. **Slavery stands in the Way of Nationality.** — What stood most in the way of the universal growth of this sort of national feeling was the great difference between the northern and southern portions of the Union caused by the existence of slavery in the South. So long as the laborers in the South were slaves and those of the North free men, these two sections could not become like one another either socially or politically, and could n[illegible] feeling. The North and North[illegible] spoke of the

nation; the South meant quite another thing. Each meant a nation socially and politically like itself. The two sections, therefore, rapidly became dissatisfied with living together under the same political system, and the secession so much talked about in various quarters in the earlier days of the Union at last became a reality. Inevitably came the war of secession, by means of whose fiery processes the differences of institution between North and South were to be swept utterly away.

880. **Civil War completes the Union.** — The war wrought changes of the most profound character. Secession was prevented, the Union was preserved, and slavery was forever abolished; these were the immediate effects of the struggle; but the remoter results were even more important. They penetrated to the changing of the very nature of the Union, though the form of the federal government remained in all essential features unaltered. The great effect of the war was, that the nation was made homogeneous. There was no longer any permanent reason why the South should not become like the rest of the country in character and sentiment. Both sections were brought to the same modes of life and thought; there was no longer any obstacle to our being in reality one great nation. The effort made in the war, moreover, to preserve the Union, and the result of the war in making the country at last homogeneous throughout, has made the federal government, as representative of the nation, seem greater in our eyes than ever before, and has permanently modified in the profoundest manner the way in which all the old questions concerning constitutionality and state rights are regarded.

881. **Present Character of the Union.** — It of course by no means follows that because we have become in the fullest organic sense a nation, ours has become a unitary government, its federal features merged in a new national organization. The government of the Union has indeed become permanent, the cherished representative, the vital organ of our life as a nation; but the states have not been swallowed up by the fed-

eral power: their prerogatives are as essential to our system as ever, — are indeed becoming more and more essential to it from year to year as the already vastly complex organism of the nation expands. But, instead of regarding the government of the United States and the government of a state as two governments, as our fathers did, we now regard them, — if we may make a matter-of-fact analysis of our working views in politics, — as two parts of one and the same government, two complementary parts of a single system. The value of the plan of government which our statesmen adopted at the first, the plan of functions divided between national and state authorities, has abated not a whit: we are only a little less anxious about the clearness of the lines of division. The national government still has its charter, somewhat enlarged since the war, but substantially the same document as of old; and the national authorities must still confine themselves to measures within the sanction of that charter: the state governments, too, still have their charters, and still have valid claim to all powers not specifically delegated to the government of the Union. Liberal construction of the federal charter the nation wants, but not a false construction of it. The nation properly comes before the states in honor and importance, not because it is *more* important than they are, but because it is all-important to them and to the maintenance of every principle of government which we have established and now cherish. The national government is the organic frame of the states: it has enabled, and still enables, them to exist.

882. **Present Character of the Government of the Union.** — It is perhaps most in accordance with the accomplished results of our national development to describe the government of the United States, not as a dual government, but as a *double* government, so complete is the present integration of its state and federal parts. Government with us has ceased to be plural and has become singular, the *government* of the United States: distinct as are its parts, they are not separate. For the sake of

convenience, we speak of the government of the Union and of the government of a state, as if the two were quite separate; but such phraseology scarcely conveys a just impression of the realities of our practice. The state and federal systems are so adjusted under our public law that they may not only operate smoothly and effectively each in the sphere which is exclusively its own, but also fit into each other with perfect harmony of co-operation wherever their jurisdictions cross or are parallel, acting as parts of one and the same frame of government, with an uncontested subordination of functions and an undoubted common aim.

883. Although these two parts of our government are thus vitally united, however, thus integrated into what is in reality a single scheme of government, state law by no means depends upon federal law for its sanction. The Constitution of the United States and the laws and treaties passed in pursuance thereof are indeed the supreme law of the land, but their supremacy does not trench upon or displace the self-originated authority of the states in the immensely important sphere reserved to them. Although it is true, taking our system as a whole, that the governments of the states are subordinate in our political order to the government of the Union, they are not subordinate in the sense of being subject to be commanded by it, but only in being less than national in their jurisdiction.

884. **The States not Administrative Divisions but Constituent Members of the Union.** — The common and convenient distinction between central and local government furnishes no ground of discrimination as between the federal and state governments. A central government, as contradistinguished from a local government within the meaning of this distinction, is a government which prescribes both the constitution and the mode of action of the lesser organs of the system to which it belongs. This the governments of the states do with reference to the townships, the counties, the cities within their territories: these local bodies are merely administrative divis-

ions of the states, agencies delegated to do the daily work of government. But, of course, there is no such relationship between the federal government and the states. They are not administrative divisions but constituent members of the Union, co-ordinate with the Union in their powers, in no sense subject to it in their appropriate spheres. They are excluded, indeed, by the federal Constitution from the exercise of certain functions, but the great and all-important functions which they do exercise are not given them by that Constitution: they are exercised, on the contrary, upon the completest principles of self-direction. We may properly distinguish the government of a county and the government of a state by the distinction between local and central government, but not the government of a state and the government of the Union.

Character, Organs, and Functions of the States.

885. **The States** properly come first in a description of the government of this country, not only because it was in conformity with state models and precedents that the federal government was constructed, but also and more particularly because the great bulk of the business of government still rests with the state authorities; because the states still carry by far the greater part of the weight of the governing function, still constitute the ordinary fountains of justice and of legal right, still stand nearest the people in the regulation of all their social and legal relationships. Like the Swiss Cantons (sec. 515), our states have given to the government which binds them together their own forms of constitution; but even more than the Cantons have our states retained their right to rule their citizens in all ordinary matters without federal interference. They are the chief creators of law among us. They are the chief c[illegible]ur political system not only, but are [illegible]ey make up the mass, the body, [illegible] stuff of the government of

the country. To them is intrusted our daily welfare, to the federal government only our collective interests. Upon the character of the state governments depends the character of the nation in its several constituent members; upon the character of the federal government depends the character of the nation as a whole. If we are to begin our study of our institutions at the centre, the heart of self-government, we must begin with the states.

886. **The Law of the States: Its Character.** — The law of each state consists of two great parts, (1) the Constitution, statutes, and treaties of the United States and (2) the constitution and statutes of the state. The Constitution, statutes, and treaties of the United States are the supreme law of the land not so much in the sense of being set above the constitutions and laws of the states as in the sense of being, by virtue of the principles of our public law, integral parts of the law of the states. The constitutions of several of the states declare the Constitution of the United States to be a part of the fundamental law of those states: but such declarations are only formal recognitions of a principle now indubitable. On their legal as well as on their political side the two parts of our system have been completely integrated. Upon the state courts as well as upon the courts of the United States rests the duty of administering federal law. The federal Constitution is a negative portion of state law in respect of the limitations which it sets to the sphere of state activity; but the laws passed by Congress under the authority of that Constitution are also positive portions of state law, whose mandates all officers of government, whether state or federal, are bound to observe.

887. The constituted authorities of the states do not stand in the same relation, however, to the Constitution and laws of the Union that they bear to state law: of state law they are the final interpreters, but of federal law they are only provisional interpreters. In acting upon federal law state officers always act subject to the supervision of the federal tribunals.

888. **The functions of the state courts with regard to the interpretation of federal law** very forcibly illustrate the adjustments of our system. If in any case brought in a state court the question arise whether a certain state law involved in the case is or is not in violation of the Constitution of the United States, the court may freely give its judgment upon the question, and if its judgment be that the law is *not* constitutional that judgment is conclusive: only when it declares the law to be in agreement with the federal Constitution may its opinion be cited to a federal tribunal for revision. The federal law is, thus, not regarded as a thing apart from the law of a state, too sacred to be handled by any but the federal courts, its specially constituted guardians: it is a part of state law and the state courts may declare and apply its principles. But of course in the last resort the federal courts are themselves to shield it from a too liberal or too prejudiced judgment by state judges, who may very conceivably be interested to vindicate the statutes of their state as against any objections drawn from the law of the Union. Both for the sake of making it uniform and for the sake of keeping it supreme must federal law receive its final adjudication in its own courts.

889. **Scope of State Law.** — A moment's thought suffices to reveal how very great a field of activity, how preponderant a part remains under our system to the states. The powers of the federal government seem great by enumeration: besides being intrinsically powers of the greatest importance, they are made the more imposing in the Constitution by the fact of their being set forth in an exhaustive list. The *residuum* of powers that remains to the states, consisting as it does of unenumerated items, is of course vague, and because vague seems unimportant by comparison. A moment's examination of this *residuum* however, a moment's consideration of its contents, puts a very different face on the matter. It is worth while for the sake of an adequate understanding of the real division of powers under our government to give to the powers remaining with the states something like the same setting forth that is given to those granted to the Union.

890. **Legislative Powers of the Union.** — The Constitution of t[illegible]nts to Congress first of all, of course, the

power to lay and collect taxes, duties, imposts, and excises for the support of the government of the Union, the payment of its debts, and the promotion of the common defence and welfare, and also the power to borrow money on the credit of the United States; but these powers of taxation and borrowing belong also to the states, except that they must raise their revenues without resort to duties, imposts, and excises, the privilege of imposing these being reserved to the Union exclusively. The powers which distinguish the general government from the governments of the states are not these powers of raising money but these others: To control the monetary system of the country, to maintain post-offices and post-roads, to grant patents and copyrights, to deal with crimes committed on the high seas or against the law of nations, to shape the foreign relations of the country, to declare war and control the military forces of the nation, and to regulate commerce both with foreign countries and among the states. It is empowered also to establish uniform rules of naturalization and uniform laws concerning bankruptcy; but these powers do not belong to it exclusively; in case Congress does not act in these matters, the states may adopt laws for themselves concerning them. All the powers of the general government are plainly such as affect interests which it would be impossible to regulate harmoniously by any scheme of separate state action, and only such; all other powers whatever remain with the states.

891. **Powers withheld from the States.** — Some powers the Constitution of the United States expressly withholds from the states, besides those granted exclusively to the general government: No state may pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility; no state may, without the consent of Congress, lay any imposts or duties, keep troops or ships of war in time of peace, enter into any agreement with another state or with a foreign power, or engage in war unless actually invaded or in such immediate danger as will not admit of delay. But

these prohibitions obviously curtail scarcely at all the sphere which the states would in any case normally occupy within the scheme of federal union.

892. **Powers left with the States.** — Compared with the vast prerogatives of the state legislatures, these limitations seem small enough. All the civil and religious rights of our citizens depend upon state legislation; the education of the people is in the care of the states; with them rests the regulation of the suffrage; they prescribe the rules of marriage, the legal relations of husband and wife, of parent and child; they determine the powers of masters over servants and the whole law of principal and agent, which is so vital a matter in all business transactions; they regulate partnership, debt and credit, insurance; they constitute all corporations, both private and municipal, except such as specially fulfil the financial or other specific functions of the federal government; they control the possession, distribution, and use of property, the exercise of trades, and all contract relations; and they formulate and administer all criminal law, except only that which concerns crimes committed against the United States, on the high seas, or against the law of nations. Space would fail in which to enumerate the particulars of this vast range of power; to detail its parts would be to catalogue all social and business relationships, to examine all the foundations of law and order.

893. A striking illustration of the preponderant part played by state law under our system is supplied in the surprising fact that only one out of the dozen greatest subjects of legislation which have engaged the public mind in England during the present century would have come within the powers of the federal government under the Constitution as it stood before the war, only two under the Constitution as it stands since the addition of the war amendments. I suppose that I am justified in singling out as these twelve greatest subjects of legislation the following: Catholic emancipation, parliamentary reform, the abolition of slavery, the amendment of the poor-laws, the reform of municipal corporations, the repeal of the corn laws, the admission of the Jews to Parliament, the disestablishment of the Irish church, the alteration of

the Irish land laws, the establishment of national education, the introduction of the ballot, and the reform of the criminal law. Of these every one except the corn laws and the abolition of slavery would have been under our system, so far as they could be dealt with at all, subjects for state regulation entirely; and of course it was only by constitutional amendment made in recognition of the accomplished facts of the war that slavery, which was formerly a question reserved for state action, and for state action alone, was brought within the field of the federal authority.[1]

894. **Non-constitutional Provisions in State Constitutions.** — One of the most characteristic features of our state law is the threatened loss of all real distinction between constitutional and ordinary law. Constitutions are of course advertised by their name to be bodies of law by which government is *constituted*, by which, that is, government is given its organization and functions. Private law, the regulation of the relations of citizens to each other in their private capacities, does not fall within their legitimate province. This principle is fully recognized in the construction of our federal Constitution, which is strong and flexible chiefly because of its great, its admirable simplicity and its strictly *constitutional* scope. But constitution-making in the states, especially in the newer states, has proceeded upon no such idea. Not only do the constitutions of the states go very much more into detail in their prescriptions touching the organization of the government; they go far beyond organic provisions and undertake the ordinary, but very different, work of legislative enactment. They commonly embody regulations, for example, with reference to the management of state property, such as canals and roads, and for the detailed administration of the state debt; they determine the amounts and sorts of property which are to be exempt from seizure for private debt; they formulate sumptuary laws, such as those forbidding the sale of intoxicating liquors; at a score of points they enter without hesitation

[1] See J. F. Jameson, *Introduction to the Constitutional and Political History of the Individual States*, Johns Hopkins Univ. Studies in Hist. and Pol. Sci., Fourth Series, p. 9 (continuous p. 189).

or misgiving the field usually reserved for the action of legislative bodies.

895. **Distrust of Legislation.** — The motive, of course, is dissatisfaction with legislation, distrust of legislators, a wish to secure for certain classes of law a greater permanency and stability than is vouchsafed to statutes, which stand in constant peril of repeal. A further motive is the desire to give to such laws the sanction of a popular vote. The practice has its analogies to the Swiss *Referendum* (secs. 521, 557). It is the almost universal practice throughout the Union to submit constitutional provisions to a vote of the people; and the non-constitutional provisions which are becoming so common in our constitutions are virtually only ordinary laws submitted to popular sanction and so placed, along with the rest of the instrument of which they form incongruous parts, beyond the liability of being changed otherwise than through the acquiescence of the same ultimate authority. The practice perhaps discovers a tendency towards devising means for making all very important legal provisions dependent upon direct popular participation in the act of enactment.

896. **The objections to the practice** are as obvious as they are weighty. General outlines of organization, such as the Constitution of the United States contains, may be made to stand without essential alteration for long periods together; but in proportion as constitutions make provision for interests whose aspects must change from time to time with changing circumstance, they enter the domain of such law as must be subject to constant modification and adaptation. Not only must the distinctions between constitutional and ordinary law hitherto recognized and valued tend to be fatally obscured, but the much to be desired stability of constitutional provisions must in great part be sacrificed. Those constitutions which contain the largest amount of extraneous matter, which does not concern at all the structure or functions of government, but only private or particular interests, must of course, however carefully drawn, prove subject to most frequent change. In some of our states, accordingly, constitutions have been as often changed as important statutes. The danger is that constitution-making will become with us only a cumbrous mode of legislation.

897. In one or two of the States the Swiss *Referendum* has been more exactly reproduced, though not, so far as I know, in conscious imitation of Swiss example. Thus the Wisconsin constitution leaves it with the people to decide whether banks shall be established by state law or not; and the constitution of Minnesota makes certain railway laws and all appropriations from the internal improvement land fund of the State dependent for their validity upon the sanction of a popular vote.

The objections to the *referendum* are, of course, that it assumes a discriminating judgment and a fulness of information on the part of the people touching questions of public policy which they do not often possess, and that it lowers the sense of responsibility on the part of legislators.

898. **Constitutional Amendments.** — The amendment of state constitutions, like the amendment of the federal constitution, can be effected only by elaborate, formal, and unusual processes which are meant to hedge the fundamental law about with a greater dignity and sanctity than attaches to any other body of legal precepts. The theory of our whole constitutional arrangement is, that the people have not only, in establishing their constitutions, bound their agents, the governing bodies and officials of the states, but have also bound themselves, — have bound themselves to change the fundamental rules which they have made only by certain formal and deliberate processes which must mark the act of change as at once solemn and fully advised.

899. **In England**, as we have seen (sec. 730), constitutional amendment is not distinguishable from simple legislation. Parliament may, by simple Act, change any, even the most fundamental, principle of government that the deliberate opinion of the nation wishes to see changed. Where the constitution consists for the most part of mere precedent, and for the rest of Acts of Parliament or royal ordinances simply, it may be altered as easily as precedent may be departed from. In England that is not easily. The great conservative force there is the difficulty with which Englishmen abandon established courses. **In**

France, constitutional amendment differs from ordinary legislation only in this, that the two chambers must sit together at Versailles, as a single National Assembly, when passing laws which affect the constitution (sec. 318). **In Germany** constitutional amendment differs from ordinary legislation only in the number of votes required for the passage of an amendment through the *Bundesrath*, in which fourteen negative votes will defeat it (secs. 404, 406, n.). In the United States, on the contrary, constitutional amendment differs from ordinary legislation both in formal procedure and in the political powers called into action to effect it. The people have always a voice.

900. **Preliminary Steps of Amendment.** — Legislatures, with us, may not undertake any general revision of the fundamental law. In case a general revision of a state constitution is sought to be effected, the legislature is empowered to propose the calling of a popular convention to be chosen specially for the purpose; the question whether or not such a convention shall be called must be submitted to the people; if they vote for its being summoned, it is elected by the usual suffrage; it meets and undertakes the revision, and then submits the results of its labors to the popular vote, which may either accept those results, or reject them and fall back upon the old constitutional arrangements.

In very many states a proposition for the calling of such a convention may be submitted to the people only if adopted by a two-thirds vote of both houses of the legislature.

901. **Proposal of Amendments.** — Legislatures may, however, themselves propose particular amendments to constitutional provisions. In some of the states a mere majority vote suffices for the preliminary adoption of amendments by the legislature, though in most larger majorities, ranging from three-fifths of a quorum to two-thirds of the elected members of each house, must be obtained. But in almost all cases popular sanction must follow: a vote of the people being made an indispensable condition precedent to the incorporation of an amendment in the fundamental law. In many states, in-

deed, amendments proposed thus by the legislature must be adopted by two *successive* legislatures besides receiving the people's sanction before it can become part of the constitution; in some a popular vote intervenes between the two legislative adoptions which must be had before the desired amendment is effected.

902. Of course the details of these processes differ widely in different states. In Vermont only the senate can propose amendments, and it only at intervals of ten years. In Connecticut amendments can be originated only by the house of representatives. Various restrictions, too, are in many of the states put upon the number of clauses of the constitution to which amendments can be proposed at any single legislative session, the number of times amendments may be submitted to the people within a specified term of years, and the method to be followed in the popular vote when more than one amendment is submitted. In most states, too, special popular majorities are required for the adoption of all constitutional changes.

903. These processes of amendment have been found by no means so difficult as they seem. The habit of inserting in state constitutions enactments not properly belonging with constitutional provisions, and which must be subject to frequent alteration, has of course led to frequent appeals to the people for purposes of amendment, and has served to show how easy amendment may be made. So easy and normal, indeed, have appeals to the people in state affairs become that the constitution of New Hampshire goes to the length of providing for the submission to the vote of the people every seven years of the question whether or not the state constitution shall be revised by a convention called for the purpose, while that of Iowa commands the submission of the same question to the people every ten years, that of Michigan every sixteen years; and the constitutions of New York, Ohio, Virginia, and Maryland direct its submission every twenty years.

904. **Conflict of Laws.**—This plan of leaving to the states the regulation of all that portion of the law which most nearly touches our daily interests, and which in effect determines the whole structure of society, the whole organic action of industry and business, has some very serious disadvantages: disadvantages which make themselves more and more em-

phatically felt as modern tendencies of social and political development more and more prevail over the old conservative forces. When the Constitution of the Union was framed the states were practically very far distant from one another. Difficulties of travel very greatly restricted intercourse between them: being, so to say, physically separate, it was no inconvenience that they were also legally separate. But now that the railroad and the telegraph have made the country small both to the traveller and to the sender of messages the states have been in a sense both geographically and socially fused. Above all, they have been commercially fused, industrially knit together; state divisions, it turns out, are not natural economic divisions; they practically constitute no boundaries at all to any distinctly marked industrial regions. Variety and conflict of laws, consequently, have brought not a little friction and confusion alike into our social and into our business arrangements.

905. **Detrimental Effects.** — At some points this diversity and multiformity of law almost fatally affects the deepest and most abiding interests of the national life. Above all things else, it has touched the marriage relation, that tap-root of all social growth, with a deadly corruption. Not only has the marriage tie been very greatly relaxed in some of the states, while in others it retains its old-time tightness, so that the conservative rules which jealously guarded the family, as the heart of the state, promise amid the confusion to be almost forgotten; but diversities between state and state have made possible the most scandalous processes of collusive divorce and fraudulent marriage.

It has become possible for either party to a marriage to go into another state and, without acquiring there even a legal residence, obtain from its courts a routine divorce because the other party has not answered a summons to defence published only in the state in which suit is instituted for divorce and therefore practically certain not to be brought to the notice of the person for whom it is intended.

Under such a system a person may be divorced without knowing it, and it may be possible for a man to keep different wives, or a woman different husbands, in several states at the same time.

906. **In the matter of taxation** so great a variety of law obtains among the states as to preclude in part a normal and healthy economic development: special taxes drive out certain employments from some states, special exemptions artificially foster them in others; and in many quarters ill-judged or ill-adjusted systems of taxation tend to hamper industry and exclude capital. So, too, as to corporations diversity of state law works great confusion and partial disaster to the interests of commerce, not only because some states are less careful in their creation and control of corporations than others, and so work harm to their own citizens, but also because loosely incorporated companies created by the laws of one state may do business and escape proper responsibility in another state.

907. **In the criminal law,** again, variety works social damage, tending to concentrate crime where laws are lax, and to undermine by diffused percolation the very principles which social experience has established for the control of the vicious classes. So, too, in laws concerning debt, special exemptions or special embarrassments of procedure here, there, and everywhere impair that delicate instrument, credit, upon whose perfect operation the prosperity of a commercial nation depends.

908. **Bankruptcy.** — One of the most serious legal embarrassments at the present time (1888) is the lack of a national bankrupt law. Since the repeal of the bankrupt law of 1867 (1878) Congress has neglected to exercise its constitutional right to legislate on the subject of bankruptcy. The consequence is that, in the absence of any action in the matter by the states, the relations of debtor and creditor have fallen into dire confusion. This is due, however, to no fault of the system, of course, but only to the neglect of Congress.

909. **Proposals of Reform.** — It is in view of such a state of affairs, such a multiformity and complexity of law touching matters which ought, for the good of the country, to be uni-

formly and simply regulated throughout the Union, that various extensions of the sphere of the federal government have been proposed by sanguine reformers, who would have all interests which need for their advancement uniform rules of law given over to the care of Congress by constitutional amendment.

910. **Evils of the Case easily exaggerated.** — Of course the extent of the legal friction and confusion complained of may easily be exaggerated. It is in most cases a confusion of detail and of procedure rather than of principle or substance, and has more exasperations for the lawyer than for the layman. Unquestionably there is vastly more uniformity than diversity. All the states, as I have said, have built up their law upon the ancient and common foundation of the Common Law of England, the new states borrowing their legislation in great part from the old. Nothing could afford clearer evidence of this than the freedom with which, in the courts of nearly every state in the Union, the decisions of the courts of the other states, and even the decisions of the English courts, are cited as suggestive or illustrative, sometimes also as authoritative, precedent. Everywhere, for instance, the laws of property rest upon the same bases of legal principle, and everywhere those laws have been similarly freed from the burdens and inequalities of the older system from which they have been derived. Everywhere there is the same facility of transfer, the same virtual abolition of all the feudal characteristics of tenure, the same separation between the property interests of man and wife, the same general rules as to liens and other claims on property, the same principles of tenancy, of disposition by will, of intestate inheritance, and of dower. Everywhere, too, contracts, common carriage, sales, negotiable paper, partnership, rest upon similar principles of practically universal recognition. We feel the conflicts, because we suffer under their vexations; while we fail to realize and appreciate the uniformities because they are normal and have come to seem matters of course. It must be acknowledged, moreover,

that even within the area of irritation there are strong corrective forces at work, a growing moral sentiment and a healthy fashion of imitation, promising the initiation and propagation of reform. As the country grows socially and politically, its tendency is to compact, to have a common thought and common practices: as it compacts, likenesses will be emphasized, diversities pared and worn away.

911. **Louisiana**, among the states, and New Mexico, among the territories, stand apart with a peculiar law of their own, unlike the law of the rest of the states, because based upon the civil law of France and Spain, which is Roman law filtered through the histories of the Romance nations. Inevitably, however, the laws of these exceptional states have approximated in some degree to the legal systems of the rest of the Union; and they will draw still closer to them in the future.

912. **Inter-state Law: Commerce.** — In a country being thus compacted, thus made broader than its states in its feelings and interests, thus turned away from the merely local enterprise of its early industrial history to the national commerce and production of the present generation, state lines must coincide with the lines of very few affairs which are not political: there must be many calls for the adjusting weight of an authority larger than that of any single state. Most such interests, happily, are commercial in their nature, and with the regulation of inter-state commerce Congress has always been charged. It was to give Congress this power, indeed, that the great constitutional convention was called: inter-state commerce was one of the chief sources of the alarming friction between the states which marked that time of crisis. It is by the operation of this power that the great railroad systems of the country, and the endless telegraph lines, have come under the guardianship, and, so far as Congress has chosen, under the regulation of the federal government. Federal law cannot touch agencies of commerce which lie wholly within a single state; but there are nowadays very few such agencies, and the jurisdiction of Congress over commerce,

where it does exist, is exclusive of all interference by the states. Federal law controls all navigable waters which constitute natural highways of inter-state traffic or intercourse, whether directly or only through their connections; it extends to such waters, not only, but also to the control of the means by which commerce must cross them in its land passage, to the construction, that is, of bridges over navigable waters for the facilitation of land traffic. It excludes every state tax or license law, every state regulation whatever, that in any way affects by way of restriction or control any movement of commerce or intercourse between the states.

913. **Posts and Telegraphs.** — Directly supplementary to the power of Congress over inter-state commerce is its power to establish post-offices and post-roads. This has been interpreted to bestow upon Congress the right to facilitate telegraphic intercourse between the states by taking measures to break down exclusive privileges granted by a state; and it must undoubtedly be taken as rounding out to a perfect wholeness the control of the general government over the means of communication between state and state.

914. Of course, too, this is a jurisdiction which must necessarily advance with lengthening strides as the movements of our already vast commerce become yearly even wider still and more rapid. It has been made, indeed, to carry also a promise even of federal ownership of the telegraph system of the country, and of a very much more extensive regulation of railway management than has yet been ventured upon. The most significant step yet taken was, of course, the creation, in 1887, of an Inter-state Commerce Commission charged with the prevention of unjust discriminations in railroad rates either for freight or passage. This Commission has already become one of the most important judicial bodies of the nation, and illustrates a very important experiment in federal control (sec. 1120).

915. **Citizenship.** — Citizenship in the United States illustrates the double character of the government. Whoever possesses citizenship in this country is a citizen both of the United States and of the state in which he lives. He cannot

be a citizen of the United States alone, or only of a state; he must be a citizen of both or of neither: the two parts of his citizenship cannot be separated. The responsibilities of citizenship, too, are both double and direct. Under our federal system punishment for the violation of federal law falls directly upon individuals, as does punishment for the violation of state law; the obligation of obedience is in both cases direct: every citizen must obey both federal law and the law of his own state. His citizenship involves direct relations with the authorities of both parts of the government of the country, and connects him as immediately with the power of the marshals of the United States as with the power of the sheriff of his own county.

916. The population of the United States is probably less stationary in its residence than the population of any other country in the world, and frequent changes of residence have led to great facilitations of the transfer of citizenship from one state to another. A very brief term of abode in a new home in another state secures the privileges of citizenship there: but in transferring his state citizenship a citizen does not, of course, at all affect his citizenship of the United States. The term of residence required for the acquirement of the privilege of suffrage varies from three months to two years and a half, but is in most cases one year.

917. **Elements of Confusion.** — A very considerable amount of obscurity, it must be admitted, surrounds the question of citizenship in the United States. The laws of our states have so freely extended to aliens the right to hold property, and even the right to vote after a mere declaration of intention to become naturalized citizens (see sec. 937), — have, in brief, so freely endowed aliens with all the most substantial and distinguishing *privileges* of citizenship, — that it has become extremely difficult to draw any clear line, any distinction not merely formal, between citizens and aliens. Of course if a person not formally naturalized exchanges residence in a state, in which he was allowed the privileges of citizenship, for residence in a state in which those privileges are denied him, he can complain of no injustice or inequality. The Constitution of the United States commands that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states"; but only federal law admits to formal citizen-

ship, and only formal citizenship can give to any one, wherever he may go, a right to the privileges and immunities of citizenship. The suffrage in particular is a privilege which each state may grant upon terms of its own choosing, provided only that those terms be not inconsistent with a republican form of government (sec. 937).

918. **Naturalization.** — Naturalization is the name given to the acquirement of citizenship by an alien. The power to prescribe uniform rules of naturalization rests with Congress alone, by grant of the Constitution. The states cannot make rules of their own in the matter, though they may, singularly and inconsistently enough, admit to the privileges of citizenship on what terms they please (sec. 937). The national naturalization law requires that the person who wishes to become a citizen must apply to a court of law in the state or territory in which he desires to exercise the rights of citizenship for formal papers declaring him a legal citizen; that before receiving such papers he must take oath to be an orderly and loyal citizen and renounce any title of nobility he may have held; and that in order to obtain such papers he must have lived in the United States at least five years, and in the state or territory in which he makes application at least one year; and at least two years before his application he must have declared in court under oath his intention to become a naturalized citizen.

It is not necessary for a person who came into the United States to live three years before coming of age to make such a sworn declaration of his intention to become a citizen. If a man who has made sworn declaration in due form of such intention dies before taking out his papers of naturalization, his widow and minor children may become citizens by merely taking the necessary oath of citizenship at the proper time. The children of persons who become naturalized, if they live in the United States, and are under twenty-one years of age when their parents take the oath of citizenship, become citizens by virtue of the naturalization of their parents.

919. **In Germany and Switzerland**, it will be remembered, the states individually admit to citizenship on their own terms, and state citizenship carries with it federal citizenship (secs. 437, 526). The European states have not, however, any of the problems of naturaliza-

tion which confront and confound us in the United States. The whole world is not coming to them as it is coming to us.

920. **Citizenship under a Confederation.** — The possession of a national naturalization law is one of the practical political features which distinguish our general government from the government of a mere confederation. The states which compose it are the only 'citizens' of a confederation: for the individual there is no federal citizenship; and the transfer by an individual of his citizenship from one state to another within the confederation is as much a mere matter of international comity as if the states were not bound together by any common law.

921. **Central Governments of the States.** — The governments of the states depend for their structure and powers, of course, entirely upon written fundamental law, upon constitutions adopted by the people at the suggestion of conventions consisting of their representatives, — upon documents which we may call popular charters. It was, as I have said, upon the models and precedents furnished by the governments of the thirteen original states that the federal government was constructed, and this was one of the features copied: the state governments, no less distinctly than the federal government, rest upon fundamental law proceeding from an authority higher than themselves.

922. A very great uniformity of structure is observable among the central governments of the states in all general features. One of the most obvious points of resemblance between them is the complete separation and perfect co-ordination of the three great departments of governmental action, — the legislative, the executive and the judicial; and these are set apart and organized under the state constitutions with a very much greater particularity than characterizes the provisions of the federal constitution.

923. **The State Legislatures: Their Powers.** —The state constitutions supplement the constitution of the Union, providing for the exercise of all powers not bestowed by the federal charter; and the legislatures of the states may be said, in

general terms, to possess all law-making powers not given to Congress. But this is by no means a complete statement of the case. State constitutions contain strict limitations of power no less than does the Constitution of the United States. Some powers there are which are altogether withheld: they cannot under our system be exercised by any existing authority: they have been granted neither to Congress nor to the legislatures of the states. Such, for example, is the power to grant to any person or class of persons exclusive political privileges or immunities, the power to bestow hereditary privileges or honors, and the power to abridge in any way the equal rights to life, liberty, and property which all our state constitutions are careful to set forth in more or less elaborate Bills of Rights. These may safely be said, however, to be powers which no state legislature would dream of exercising, inasmuch as they would have to be exercised, if exercised at all, in the face of a public opinion which would certainly refuse re-election to any legislator who should violate the principles of republican government so strenuously worked out in our history, from Magna Charta down, and now so warmly cherished by all classes of our people that no denial of them could stand upon our statute books a single twelvemonth. These are merely limitations put upon reaction.

924. **Limitations of Length of Session, etc.** — There are other limitations, however, of a very different character contained in our state constitutions: limitations meant specially to control the action of legislatures within the sphere of their proper and undoubted powers, and unquestionably based upon a general distrust of the wisdom, if not of the honesty, of legislators. Thus our constitutions very commonly forbid all private or special legislation, confining legislatures to the passage of general laws applying uniform rules to all persons and all cases alike. They limit, moreover, in very many cases, the length and frequency of legislative sessions, providing that the legislature shall convene, for instance, only once in

every period of two years, and shall continue its biennial session for not more than a certain number of days, except under special or exceptional conditions, when extra sessions may be called by the governor or regular sessions extended by a special two-thirds or three-fifths vote. Many constitutions contain, also, minute provisions concerning the conduct of legislation, forbidding the introduction of bills later than such and such a day of a limited session, prescribing the general form of bills, limiting their subject-matter to a single object each, and even commanding the manner of their consideration.

925. **Other Limitations.** — More than this, as we have seen, there are certain classes of legislative provisions which have been removed beyond the cognizance of legislatures by being put into the constitutions themselves: such as exemptions of certain classes of property from seizure for private debt (generally called "Homestead exemptions"), 'prohibition' provisions, etc. The embodiment of such measures in constitutions is, as I have said (secs. 894, 895), only a means of putting them beyond legislative interference, — is a limitation of the same indirect sort as a Bill of Rights. It is usual, also, for our state constitutions to limit the power of legislatures to create corporations, by provisions which direct the passage of general laws of incorporation to be applied in a formal administrative manner by the courts, to which applications for incorporation are to be made.

926. The period to which the duration of legislative sessions is restricted varies from forty days (Colorado, Georgia) to ninety days (Maryland and Virginia), the most usual period being sixty days. It is noteworthy that only four of the original thirteen states have put a restriction upon the sessions of their legislatures. Eight of these thirteen have, however, on the other hand, restricted either wholly or in part the power to pass private or special legislation, — the power, that is, to make special rules for special cases or for particular individuals. It is nevertheless true that it is in the newer states, for the most part, that the strictest and most extensive limitations of legislative power are to be found.

927. **State Legislatures not Sovereign Bodies.** — It will thus be seen that our state legislatures are not in any sense 'sovereign' bodies: the only sovereign authority lies with the people. There is a certain serviceable clearness of view to be had by regarding the state governments as corporations: their legislatures are *law-making bodies* acting within the gifts of charters, and by these charters in most cases very strictly circumscribed in their action. It is this fact which gives so unique a place of power under our system to the courts, the authoritative interpreters of the fundamental law to which all legislation and all executive action must conform.

928. **Legislative Organization.** — In all the states the legislature consists of two houses, a senate and house of representatives, and in most of them the term of senators is four years, that of representatives two years, one-half of the senate being renewed every two years at the general elections. There is no such difference in character, however, between the two houses of the state legislatures as exists between the Senate and the House of Representatives of the United States. Connecticut, as we have seen (sec. 869), furnished the suggestion upon which the framers of the federal constitution acted in deciding upon the basis and character of representation in the two federal houses; for in the Connecticut legislature of that time the house represented the towns, as the confederate units of the state, while the senate represented the people directly. Even Connecticut has now abandoned this arrangement, however, and in almost all the states representation in both houses is based directly upon population, the only difference between the senate and house being that the senate consists of fewer members representing larger districts. Often, for instance, each county of a state is entitled to send several representatives to the lower house of the legislature, while several counties are combined to form a senatorial district.

929. **Reasons for Two Houses in State Legislatures.** — There is, consequently, no such reason for having two houses in the states as

exists in the case of the federal government. The object of the federal arrangement is the representation of the two elements upon which the national government rests, namely, the popular will and a federal union of states. The state legislatures have two houses simply for purposes of deliberateness in legislation, in order, that is, that legislation may be filtered through the debates of two co-ordinate bodies, representing slightly differing constituencies, though coming both directly from the people, and may thus escape the taint of precipitation apt often to attach to the conclusions of a single all-powerful popular chamber. The double organization represents no principle, but only an effort at prudence.

930. The reason for our having double legislatures cannot, however, be so simply explained. It is compounded of both deliberate and historical elements. Its historical grounds are sufficiently clear: the senates of our states are lineal descendants of the councils associated with the colonial governors, though of course they now represent a very different principle. The colonial councils emanated from the executive, and may be said to have been parts of the executive, while our senates, of course, emanate from the people. Then, too, there was the element of deliberate imitation of English institutions. One hundred years ago England possessed the only great free government in the world; she was, moreover, our mother-land, and the statesmen who formed our constitutions at the revolution naturally adopted that English fashion of legislative organization which has since become the prevailing fashion among all liberalized governments. Possibly, too, they were influenced by more ancient example. The two greatest nations of antiquity had had double legislatures, and, because such legislatures existed in ancient as well as in modern times, it was believed that they were the only natural kind.

931. **Historical Precedents.** — Greeks, Romans, and English alike, of course, had at first only a single great law-making body, a great senate representing the elders or nobles of the community, associated with the king, and, because of the power or rank of its members, a guiding authority in the state. In all three nations special historical processes produced at length legislatures representing the people also; the popular assemblies were, on one plan or another, co-ordinated with the aristocratic assembly, and presently the plan of an aristocratic chamber and a popular chamber in close association appeared in full development. We copied the English chambers when they were in this stage of real co-ordination; before her legislature had sustained that great change, which Greece and Rome also had witnessed, whereby all real power came to rest again with a single body, the popular assembly.

932. **Terms of Senators and Representatives.** — Among the older states of the union there is a more noticeable variety of law as to the *terms* of senators and representatives than is to be found on a comparison of the constitutions of the newer states. In Massachusetts and Rhode Island, for instance, the term of both senators and representatives is a single year only. In New Jersey senators are elected for three years, one-third of the senate being renewed every year at the election for representatives, whose term in New Jersey is but one year. A large number of the states, however, both new and old, limit the term of senators to two years, the term of representatives; while in Louisiana representatives are given the same term as senators, namely, four years.

933. **Names of the Houses.** — There is some variety among the states as regards the name by which the lower house of the legislature is known. In New York the popular house is called "the Assembly"; in Virginia, the "House of Delegates"; in New Jersey, the "General Assembly," — a name generally given in most of the states to the two houses taken together.

934. **The qualifications** required of senators and representatives vary widely in the different states, but not in any essential point of principle. It is universally required, for example, that members of the legislature shall be citizens; it is very generally required that they shall be residents of the states, sometimes that they shall be residents of the districts, for which they are elected; and it is in almost all cases required that a member of the legislature shall have reached a certain age. Variety appears in these provisions only in respect of particulars, of details, as to the length of time citizenship or residence shall have been acquired before election, the particular age necessary, etc.

The age required varies in the case of senators from twenty-one to thirty years, in the case of representatives from twenty-one to twenty-five.

Only in Delaware is a property qualification prescribed. In that state no one can be a senator who is not possessed of a freehold estate of two hundred acres or of personal or mixed estate worth £1000.

935. **Legislative Procedure.** — The same general rules of organization and procedure are observed in the constitution and business both of Congress and of the state legislatures. The more numerous branch is in all cases presided over by an officer of its own election who is called the 'Speaker'; the senate sits under the presidency, generally, of a *Lieutenant Governor*, who occupies much the same place in the government of the state that the Vice President of the United States occupies in the national government: he is contingent substitute for the governor.

936. **Standing Committees.** — The houses of the state legislatures, too, being separated from the executive in such a way as to be entirely deprived of its guidance, depend upon standing committees for the preliminary examination, digestion, and preparation of their business, and allow to these committees an almost unquestioned command of the time and the conclusions of the legislature. The state legislatures of the early time, as I have said, served as models for Congress; they and the legislatures of the later states, made like them, have retained substantially that first plan of organization, following the rules of parliamentary practice universally observed among English-speaking peoples; and they and Congress alike have had in the main the same development: as they have grown larger they have grown more dependent upon their advisory parts, their committees.

In several States the constitutions themselves command the reference of all bills to committees and forbid the passage of any measure which has not been referred and reported upon.

937. **The Suffrage.** — The suffrage is in all the states given by constitutional provision to male citizens twenty-one years of age; but it does not in all the states stop there. Many of the states extend the privilege of voting also to every male resident of foreign birth who is twenty-one years of age and has declared his intention to become a naturalized citizen;

and ten states grant it to every male citizen or '*inhabitant*' of voting age. The laws of almost all the states require residence in the state for a certain length of time previous to the election in which the privilege is sought to be exercised (the period varies all the way from three months to two years and a half), as a condition precedent to voting; most require a certain length of residence in the county also where the privilege is to be exercised; some a certain length of residence in the voting precinct. Many states require all voters to have paid certain taxes; but no state has a property qualification properly so-called.

938. In Connecticut and Massachusetts the suffrage is confined to those who can read the laws of the state. It is common, of course, throughout the country to exclude criminals, insane persons, idiots, and in several states the privilege is withheld from those who bet on elections. In Florida betting on an election not only excludes from the election in connection with which the offence is committed, but is punished, upon conviction, by entire and permanent disfranchisement. A number of states also shut out duellists.

939. The privilege of voting in school elections is given to women in Massachusetts, Minnesota, and Colorado, though the constitutions of all the states without exception declare the suffrage to be restricted, in general, to males. In the three territories of Washington,[1] Wyoming, and Utah, women are allowed to vote in all elections. In Kansas they have the elective franchise in municipal elections.

940. **The State Courts.** — A very great variety of course exists among the laws of the several states regarding the constitution, functions, and relative subordination of the courts. A general sketch of the state courts must, therefore, be made in very broad outline. Perhaps in this department of state law, as in others, there may be said to be, despite a bewildering variety of detail, sufficient unity of general feature to warrant a generalized description, and to render unnecessary the unsatisfactory expedient of choosing the institutions of a single

[1] Washington Territory became a state July 1, 1889, being admitted along with Montana, North Dakota, and South Dakota.

state as in some broad sense typical, and describing them alone.

941. The courts of our states are in no sense organs of federal justice, as the courts of the German states are (sec. 436); they have an entirely independent standing and organization and an entirely independent jurisdiction. Their constitution and procedure are in no way affected by federal law, — except of course by way of limitation; — their sphere is a sphere apart. The series of courts in each state, therefore, is complete: every state has its supreme court, as well as its inferior tribunals, and appeals lie from the state courts to the courts of the United States only in cases involving federal law or in cases where the character of the parties to the suit does not give any state court complete jurisdiction (secs. 888, 1082, 1083).

942. One of the most characteristic features of our state courts is what I may call their *local attachment*. In most cases the judges are not appointed by any central authority but are elected by the voters of the district or circuit in which they hold court: they, like members of legislatures, may be said to have 'constituents.' Their responsibility is thus chiefly a responsibility to the electors, a popular rather than official responsibility. The courts are held together in a common system and to a common duty *by law*, therefore, not by discipline or official subordination to superior judicial authorities. The courts may be said to be local rather than central organs; they are integrated only by the course of appeal, by the appellate authority of the higher over the lower courts in points of law.

943. This *localization* of the organs of government, in their origin as well as in their functions, is a general characteristic of American political organization, — a characteristic which appears most conspicuously in the arrangements of local government, which is, as we shall see, not so much organized as left to organize itself under general statutes for whose enforcement no central machinery is provided.



944. **Common Law Courts.** — There are, usually, four grades of jurisdiction in the judicial systems of the states, with four grades of courts corresponding. There are generally (1) *Justices of the Peace*, who have jurisdiction over all petty police offences and over civil suits for trifling sums; who conduct preliminary hearings in cases of grave criminal offence, committing the accused, when there is *prima facie* proof of guilt, for trial by a higher court; and who are, in general terms, conservators of the peace. They act separately and have quite lost the high judicial estate which still belongs to the English Justices, from whom they take their name. Their decisions are in almost all cases subject to appeals to higher courts.

Mayor's courts in the towns are generally the same in rank and jurisdiction, so far as criminal cases are concerned, as the courts of Justices of the Peace.

945. (2) **County or Municipal Courts,** which hear appeals from Justices of the Peace and from Mayor's courts, and whose own original jurisdiction is one step higher than that of the Justices, including civil cases involving considerable sums, and criminal cases generally not of the gravest character.

Often, however, courts of this grade, especially the municipal courts of the larger towns, are given a much higher jurisdiction and are coordinated in some respects with courts of the next higher grade, the Superior Courts.

In New York, New Jersey, and Kentucky the county courts retain the English name of Quarter Sessions.

946. (3) **Superior Courts,** which hear appeals from the county and municipal courts, and generally from all inferior courts, and which are themselves courts of high original jurisdiction of the most general character in both civil and criminal cases. They may be said to be the general courts which give to the courts of lower grade their name of 'inferior.' County and municipal courts, as their names imply, sit only for certain small districts; but the districts over which superior courts have jurisdiction usually cover a wide area, necessitating the

sitting of each such court in several places in succession. In other words, superior courts are generally circuit courts, as in many states they are called.

'Circuit courts' is, indeed, the most generally used name for courts of this grade, that is, for the principal courts of the state; though in almost as many states they are called 'district courts.' In most of the states these courts have, of course, special judges of their own; but in Maine and New Hampshire they are held by the judges of the supreme court on circuit.

947. In some states civil is separated from criminal jurisdiction in this grade, and distinct courts are created for each. Thus in New York there are Circuit courts which hear civil causes and courts of Oyer and Terminer, immediately subordinated to a court of General Sessions, for the hearing of criminal cases; and in Texas there are District courts for civil causes, District Criminal courts for criminal cases. In Pennsylvania courts of Quarter Sessions are the courts of general criminal jurisdiction, as in England, civil causes going to the courts of Common Pleas. Delaware has criminal courts called courts of Gaol Delivery.

948. (4) **Supreme Courts,** which in most of the states have no original jurisdiction at all, but only appellate jurisdiction, hearing appeals in all classes of cases (except such as involve only trifling offences or small sums of money) from the superior courts and from various inferior courts.

949. (5) In five states there are *supremest* courts above the 'supreme.' Thus in New York a Court of Appeals revises errors made in certain cases by the supreme court; in New Jersey there is a supreme court above the circuit, which is itself of high appellate jurisdiction, and a Court of Errors and Appeals above the supreme; in Louisiana the order is reversed and there is a supreme court above a court of appeals; in Illinois a supreme court above certain district "appellate courts"; and in Kentucky a court of appeals above a supreme court which is called 'superior' simply. In Texas there are two co-ordinate supreme courts: one, called the supreme, for the hearing of civil cases only, the other, called the court of appeals, for the hearing of criminal cases and of civil cases brought up from the county courts.

950. Decisions rendered by the supreme court of the District of Columbia are subject to revision by the supreme court of the United States.

951. The name 'court of appeals' is found also in Maryland, Virginia, and West Virginia.

952. In five of the original states (New Hampshire, Massachusetts, Rhode Island, New York, New Jersey), and in Maine, the supreme courts have, anomalously enough, *original* as well as appellate jurisdiction in all cases; but in the newer states such an arrangement is never found.

953. In several of the larger cities of the country there are complete sets of courts, reproducing the state judiciary in small. Thus in Baltimore, for example, there are city courts from the lowest grade up to a "Supreme Bench of Baltimore City."

954. **Courts of Equity.** — "Equity" is defined, under the legal systems of England and the United States, as "that portion of remedial justice which is exclusively administered by a court of equity, as contradistinguished from that portion of remedial justice which is exclusively administered by a court of common law" (Story). In other words, it is that portion of remedial justice which was administered in England by the Chancellors, who were 'the keepers of the king's conscience,' and from whose court, as if from the king's sense of justice, there issued writs from time to time for the remedy of wrongs for which the common law made no adequate provision (secs. 666, 1189, 1190). The early Chancellors were ecclesiastics imbued with Roman law as it had come down through the medium of the canon law, and both in their hands and in those of their lay successors of later times, who were the heirs of their principles and prerogatives, equity law and procedure became a very different thing from the law and procedure of the common law courts (sec. 956).

955. **Fusion of Law and Equity.** — As time has gone on equity and law have been largely fused, even in England, just as the *jus gentium* and the *jus civile* became merged in the development of the Roman law (secs. 206, 208, 212, 216); and in most of the states of the Union the same courts exercise both equitable and common law jurisdiction. In several states the whole procedure, even, in both jurisdictions has been made practically identical, and law is not distinguishable from

equity. Generally, however, the distinctive procedure has been preserved, and only courts of the superior and supreme grades have been given equitable jurisdiction, — jurisdiction, that is, over cases in which the remedy is equitable. In Alabama, Delaware, Michigan, Mississippi, New Jersey, Tennessee, and Vermont there are still special chancery courts.

956. Equity processes of trial differ from common law processes, outwardly, chiefly in the fact that the testimony is written instead of oral, and that decisions of fact as well as of law rest with the judge instead of with a jury. For its special subject-matter equity jurisdiction generally embraces such matters as trusts, mistakes, frauds, etc. — matters hardly tangible by ordinary remedies.

957. **Probate Courts.** — In most of the states there are special probate courts, — special courts, that is, charged with jurisdiction over the proof of wills, the administration of estates, the appointment of guardians, administrators, etc., the care of the estates of wards, and, in general of the proper disposition of the property of persons deceased. In many states, however, these functions are left to the ordinary courts of law.

958. In England this probate jurisdiction was, from the first until a very recent date, a prerogative of the ecclesiastical courts, and in two of our states the probate courts retain the names of the officers who exercised this function in the place of the bishop: in Georgia the court is called the court of the 'Ordinary,' in New York the 'Surrogate's' court. In New Jersey, with a reminiscence of the same origin, it is called the 'Prerogative' court. In several states, on the other hand, it is known, by virtue of one side of its function, as the 'Orphan's' court.

959. **Judges.** — The judges of most of the state courts are elected, generally by the people, in a few cases by the legislature; only in Delaware are they appointed by the governor, though in several states they are nominated by the governor and appointed by and with the advice and consent of the Senate.

Supreme court judges are usually elected by the people of the state at large; circuit, district, county, municipal, and other judges by the electors of the area in which they serve.

The terms of judges range all the way from two years to a tenure during good behavior.

960. In New Hampshire, Delaware, and Massachusetts all judges of the higher courts hold during good behavior; and in Rhode Island, and the District of Columbia also, judges of the supreme court have a like life tenure.

Of course the length of the term varies with the grade of the court, the tendency being to give longer terms to the judges of the higher courts.

961. **The qualifications** required of judges by state law are not stringent. Only some eight or nine of the states require by law any identification of their judges with the legal profession; and only six require 'learning in the law'; though of course, custom and public opinion generally confine the choice of judges to professional lawyers. Generally a certain age is required of judges (varying, where there is such a requirement, from twenty-five to thirty-five years), besides, in most cases, citizenship and residence in the state or circuit.

As a rule single judges hold all the courts except the highest. Supreme courts have a more or less numerous 'bench.'

962. **The ministerial officers of the state courts,** the sheriffs, are generally not appointed by the judges or responsible to them, but elected by the people and answerable to 'constituents,' just as the judges themselves are. Even the clerks of the courts are often elected.

963. The position of sheriff thus differs very materially from the position of a United States marshal (sec. 1091), the sheriff's counterpart in the federal judicial system. The marshal is appointed by the President of the United States, and is responsible to a central authority, is part of a centralized organization of justice. The sheriff, on the contrary, is the organ of an extremely decentralized, an almost disintegrated, organization of justice.

The bailiffs, the sheriff's deputies, are usually the appointees of the sheriff.

964. **The State Executives.** — The Executives of the states are the least distinct parts of state organization, the least one-

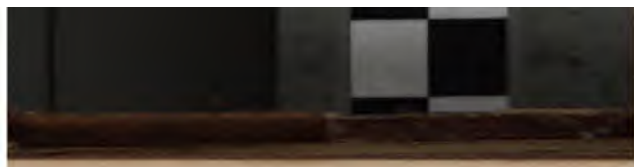
ceptible of being adequately pictured in outline, or indeed in any broad and general way. Under our system of state law the executive officers of a state government are neither the servants of the legislature, as in Switzerland, nor the responsible guides of the legislature, as in England, nor the real controlling authority in the execution of the laws, as under our own federal system. The Executive of a state has an important representative place, as a type of the state's legal unity; it has a weighty function of superintendence, is the fountain of information, the centre and source of advice, the highest organ of administration to the general eye; but it cannot be said to have any place or function of guiding power. Executive power is diffused by our law throughout the local organs of government; only a certain formal superintendence remains with the authorities at the state capitals.

Of course this does not apply to the governor's *veto* power, — that contains real energy, — but only to executive functions proper; these are localized, not centralized, after the extremest pattern.

965. Not all of the states have the same central executive officers. All, of course, have governors; twenty-seven have lieutenant governors; all have secretaries of state; all have treasurers; almost all have attorneys-general; and a majority, superintendents of education. Many have also auditors; eleven have comptrollers, and fifteen boards of education; four (Massachusetts, New Hampshire, Maine, North Carolina) associate councils with their governors.

966. For the rest, there are minor officers of various functions in the different states; superintendents of prisons, for instance, registrars of land offices, superintendents of labor, bureaux of agriculture, commissioners of mines, commissioners of immigration, etc. There is, of course, no uniformity between the administrations of the states as regards these special offices; different states undertake different functions, new or old, and create new, or revive old, offices accordingly.

967. **The governor's term of office** is in almost all of the states either two or four years, although Massachusetts and



Rhode Island give their governors a term of but a single year, while New York and New Jersey elect theirs for three. The lieutenant-governor, where such an officer is elected, has the same term as the governor, and is generally required to have the same qualifications.

968. These *qualifications* consist, almost always, of citizenship of from two to twenty years standing, residence within the state of from one to ten years, and age of from twenty-five to thirty years.

In Maine it is required that the governor shall be a *native-born* citizen. Massachusetts imposes upon candidates for her governor's chair a property qualification, namely, the possession in his own right of freehold property lying within the state, and worth £1000.

969. **The terms of the other principal state officers** are usually the same as the term of the governor, though it is not uncommon to give to treasurers, secretaries of state, attorneys-general, and auditors a longer tenure. The qualifications required of the different officers are of course of the most various nature.

In New York, though the governor and lieutenant-governor hold for three years, the other officers of state are given terms of only two years.

970. The constitutions of many of the states still exhibit the jealousy of long terms of office which was so characteristic of the extreme democratic feeling generated in the colonies by the constant friction between the representatives of the people and officials who owed their offices, not to election, but to royal appointment. The constitution of Mississippi forbids the holding of any office for life or during good behavior; seven states limit official tenure to a maximum period of seven years; Texas makes two years the maximum; and Massachusetts, Virginia, and Maryland give express constitutional sanction to *rotation in office*.

971. Many states effect such a limitation with reference to the tenure of the governor's office by provisions setting bounds to the re-eligibility of the governor. Thus some exclude their governors from successive terms; others allow only a single term to any one man within a specific period of, say, eight years; while still others withhold re-eligibility altogether.

972. Contrast between State and Federal Executives. — The federal executive was, as we have seen (sec. 869), constituted in quite close accordance with the models of previous state organization; but the imitation can scarcely be said to have gone further than the adoption of the suggestion that the United States should have a single governmental head, a president, because the states had tried and approved a single presidency. For the rest, the president was given the character, as regards his relations with the other officials of the federal system, rather of an English sovereign than of a state governor. Certainly the contrast between the official place and power of the president and the place and power of the state governors of the present day is a very sharp and far-reaching contrast indeed. The president of the United States is the only executive officer of the federal government who is elected; all other federal officials are appointed by him, and are responsible to him. Even the chief of them bear to him, in theory at least, only the relation of advisers; though in fact, it must be acknowledged, they are in effect his colleagues. Of state officials associated with the governor it may, on the other hand, be said that both in law and in fact they are colleagues of the governor, in no sense his agents or subordinates, except perhaps in mere formal precedence. They, like himself, are elected by the people; he is in no way concerned in their choice. Nor do they serve him after election. They are not given him as advisers; they are, on the contrary, co-ordinated with him. North Carolina, indeed, calls her chief officers of state a 'cabinet'; but they are not dependent upon each other even in counsel, and they are quite as independent of the governor as Congress is of the president. The only means of removal to which the principal officers of the states are subject is, ordinarily, *impeachment*, to which the governor also is equally exposed. Both they and he may be charged with official crimes and misdemeanors by the house of representatives and tried, convicted, and removed by the senate of the state. Their



only other responsibility is to the courts of law, to which, like any other citizens, they are answerable, after removal from office, for actual breaches of law. Governor, treasurer, secretary of state, attorney-general, — all state officers alike, serve, not other officers, but the people, who elected them; upon the people they are dependent, not upon each other; they constitute no hierarchy, but stand upon a perfect equality.

973. In Delaware, Kentucky, Maryland, New Jersey, Pennsylvania, West Virginia, and Texas, the secretaries of state are appointed by the governor, subject to confirmation by the senate; in several states the attorney-general also is appointed; nor is it uncommon for the state superintendent of education to be an appointee of the governor: and these facts offer apparent contradiction to the statement that the several constituent parts of the state executives stand always apart in complete independence and co-ordination, — especially when it is added that in one or two states officers so important as the secretary of state and the attorney-general *hold during the pleasure of the governor*. But these cases constitute in fact no real exceptions: for the duties of such officers, after their appointment, are prescribed by constitutional provision or by statute, not by the governor; and the governor may remove them, not at his whim, but for just legal cause only. In brief, though appointed by him, they do not depend upon him.

974. **Real Character of a State 'Executive.'** — The governor therefore, is not the 'Executive'; he is but a single piece of the executive. There are other pieces co-ordinated with him over which he has no direct official control, and which are of less dignity than he, only because they have no power to control legislation, as he may do by the exercise of his veto, and because his position is more representative, perhaps, of the state government as a whole, of the people of the state as a unit. Indeed it may be doubted whether the governor and other principal officers of a state government can even when taken together be correctly described as 'the executive,' since the actual execution of the laws does not rest with them but with the local officers chosen by the towns and counties and bound to the central authorities of the state by no real bonds

of responsibility whatever. Throughout all the states there is a significant distinction, a real separation, between 'state' and 'local' officials; local officials are not regarded, that is, as state officers, but as officers of their districts only, responsible to constituents, not to central authorities. In all the states, probably without exception, the sheriffs and other county officers, the county treasurers, clerks, surveyors, commissioners, etc., and the town and city officials also, as well as the judges of the courts and the solicitors or district attorneys who represent the public authority before the courts, are chosen by the voters of limited areas, and are regarded, for the most part, as serving, not the state, but *their part of the state.* Minor 'state' officers there are, — minor officers, that is, who serve ministerially the central offices, — and these are often appointed by the governor; but it is exceptional for the governor to control in any real sense the officials, the local authorities, by whom the laws are in fact put into actual operation. The president of the United States is the veritable chief and master of the official forces of the federal government; he appoints and in most cases can remove, for cause, all federal marshals, district attorneys, revenue officers, post-office officials. But the governor of a state occupies no such position; nor does any high 'state' official; the central offices of a state constitute a system of supervision and report often, but seldom a system of control.

975. In Michigan, it is true, all officials not legislative or judicial may be removed by the governor for just legal cause; in New York, too, sheriffs, coroners, district attorneys, and county clerks are removable by the same authority, and in Wisconsin sheriffs, coroners, district attorneys, and registrars of deeds; but such provisions are exceptional, and are not accompanied by any real integration of local government by a system of continuous central control. Government remains disjointed, — still lies in separated parts.

976. **Relations of the Local to the Central Organs of Government in the States.** — It is characteristic of our state organization, therefore, that the counties, townships, and cities into which the states are divided for purposes of local government do not serve as organs of the

states exactly, but rather as independent organisms, constituted what they are by state law, indeed, but after being set up, left to themselves almost as entirely as if they were self-constituted. They elect their own officers and go their own paces in enforcing the general laws of the state.

977. We have not, therefore, local '*self-government*,' in the sense in which Professor Gneist has found that term to be properly used when employed in the light of its Teutonic history; we have, instead, separate local self-direction which is not the application of government, but the play of independent action. Our local areas are not *governed*, in brief; they act for themselves. Self-government implies, when used in its strict historical meaning, that the officers of local administration are officers of the *state*, of the central authority, whatever may be the machinery of their appointment, and that their responsibility is central, not to their neighbors merely. The only sense in which the local units of our state organization are *governed* at all is this, that they act under general laws which are made, not by themselves, but by the central legislatures of the states. These laws are not executed by the central executive authorities, or under their control, but only by local authorities acting in semi-independence. They are, so to say, left to run themselves.

978. **The Governor.** — The usual duties of a state governor may be conveniently summed up under four general heads: (1), as towards the legislature, it is his duty to transmit to the houses at each regular session, and at such other times as may be required, full information concerning the state of the commonwealth, and to recommend to them such measures as seem to him necessary for the public good. It is also his duty in case of necessity for such a step, or upon the requisition of a sufficient number of legislators, to summon the houses to extra session. (2) He is commander-in-chief of the state militia, and as such is bound to see, not only that foreign invasion is repelled, but also that internal order is preserved. (3) He exercises the clemency of the state towards condemned persons, having the right to grant pardons to persons convicted of crime, to remit fines and penalties, under certain conditions, and to remove political disabilities incurred in consequence of conviction of crime; though he exercises these high prerogatives subject always to a definite responsibility to public opinion and to the laws.

In some states, as notably in Pennsylvania, the power of granting pardons is given to the governor, however, only in form, the sanction being made necessary of a Board of Pardons, whose action is semi-judicial.

(4). In all the states except four (Delaware, Rhode Island, Ohio, North Carolina) the governor's assent is made necessary to the validity of all laws not passed over his dissent by a special legislative vote upon a second consideration made in full view of the governor's reasons for withholding his signature.

979. All bills which the governor signs, or upon which he does not take any action within a certain length of time, become law; those which he will not sign he must return to the legislature with a statement of his objections. Generally he must return bills which he thus rejects to the house in which they originated, though in Kansas he must return them always to the House of Representatives.

980. The vote by which a bill may be passed over the governor's veto varies very widely among the states. In Connecticut a mere majority suffices for its second passage; in other states a three-fifths vote is required, in some a two-thirds vote; sometimes a majority of elected members (instead of a special number within a mere quorum) must concur in a second passage; and sometimes two-thirds of the elected members. In Missouri it is provided that the votes of two-thirds of the elected members shall be necessary in the house in which the measure originated, while a mere majority of the other house will suffice.

981. In thirteen of the states the governor is given the power to veto particular items in appropriation bills; as regards all other bills his approval or disapproval must cover all of the measure or none of it.

982. **The Secretary of State.** — The title 'Secretary of State' borne by a conspicuous officer in each of the states is very apt to mislead those who have studied first the English executive or the functions of our own minister of foreign affairs. The federal Secretary of State is first of all an executive minister, only secondarily a secretary; and the five principal Secretaries of State in England are equally without prominent secretarial functions. They are one and all executive heads of department.

983. The federal Secretary of State is entitled to his official name chiefly by virtue of certain minor duties seldom thought of by the public in connection with the Department of State. He has charge of the

seal of the United States; he preserves the originals of all laws and of all orders, resolutions, or votes of the houses which have received the force of law; he furnishes to Congress, besides consular and diplomatic reports, lists of passengers arrived in the United States from foreign countries, etc.

984. The chief clerical features of the office which the five Principal Secretaries of State in England theoretically share (sec. 693) would seem to be represented by the necessity of the countersignature of some one of them to the validity of the sign-manual.

985. The Secretaries of State in the commonwealths of our Union, on the contrary, can show substantial cause for holding their title; the making and keeping of records is the central duty of their office. It is usually their duty to register the official acts of the governor, to enroll and publish the Acts of the Legislature, to draw up all commissions issued to public officers, to keep all official bonds, to record all state titles to property, to keep and affix, where authorized, the seal of the commonwealth, to preserve careful records of the boundaries of the various civil districts (the counties, townships, etc.) of the state, and to give to all who legally apply duly attested copies of the public documents in their keeping. In brief, the Secretary's office is the public record office.

986. Often other duties are assigned to the Secretary of State. In one state, for instance, he is constituted Internal Improvement Commissioner; in another Surveyor-general. But such additional functions are not, of course, characteristic of his office.

987. It is to the Secretary of State in each commonwealth that the votes of the state's electors for President and Vice President are returned; it is he who transmits them to the president of the Senate to be opened in the joint session of the two houses.

988. Votes in state elections also are generally returnable to the Secretary of State's office, and the Secretary of State is very commonly one of the state canvassers of election returns. Such duties manifestly flow very naturally from the general duties of his office.

989. **The Comptroller**, or that equivalent officer, the state *Auditor*, is public accountant. It is his function to examine and pass upon all claims presented under existing provisions

of law against the state; to audit the accounts of all officers charged with the collection of the revenue of the state, filing their vouchers, and requiring of them the necessary bonds, and crediting them with all sums for which they present the state Treasurer's receipt; to ensure uniformity in the assessment and collection of the public revenue by preparing and furnishing to the local fiscal officers the proper forms and instructions; to issue warrants for all legal disbursements of money from the treasury of the state, keeping a careful account with the state treasurer; to submit his books and accounts at any time to examination by the legislature: in a word, to regulate the assessment, collection, and disbursement of the public moneys.

990. **The State Treasurer** may be said simply to keep the public moneys subject to the warrants of the Comptroller. Without such warrant he can pay out nothing.

991. These, manifestly, are not offices of control. The Comptroller, for example, can generally proceed against local fiscal officers through the local law-representatives of the state, the local states-attorneys, in the ordinary courts, for the purpose of securing the necessary bonds, when these are not promptly or properly given, or of enforcing the payment of moneys withheld or uncollected; and he may make test of the validity or sufficiency of official bonds by any means within his reach; but he has none but this judicial control, this indirect control, that is, exercised through the courts over officers who refuse bond or who neglect the forms and instructions issued to them regarding the assessment and collection of taxes. The whole machinery of control is local, not central, — through courts and states-attorneys who are themselves elected by the same persons, in town or county, by whom the collecting officers are chosen. The local fiscal officers are not, in other words, officers of the state Treasury, but officers of the towns and counties whom the state employs as its agents.

992. **The State Superintendent of Education** often occupies a somewhat different position. It is his prerogative to prescribe the qualifications of teachers and the methods by which they are to be selected; he exercises a thorough inspection of the schools throughout the state; often he is given power to

secure proper reports of school work through special inspectors appointed to act instead of local superintendents whose reports are irregular or unsatisfactory. School administration is recognized to require a certain degree of centralization of authority, and so to constitute a legitimate exception to the general rules as to the constitution of executive power in the states. Still, even the power of a state Superintendent of Education does not often go very much beyond mere supervision. The powers of district or township school directors remain in most cases very absolute as regards the management of the schools. They are governed by statute, not by the state Superintendent.

993. **Constitutional Diffusion of the Executive Power.** — The constitutions of at least seven of the states make very frank confession of the diffusion of executive authority upon which I have dwelt as characteristic of our state system. Thus the constitution of Alabama provides that the executive power "shall consist of the governor, Secretary of State, state treasurer, state auditor, attorney-general, and superintendent of education, and the sheriff for each county." The constitutions of Arkansas, Colorado, Illinois, Minnesota, Pennsylvania, and Texas, make similar enumerations, with the exception of the sheriffs of the counties. The Florida constitution of 1868 provided that the governor should be "assisted by a cabinet of administrative officers" appointed by himself, subject to the confirmation of the Senate; but clothed these officers with functions which made them in fact not assistants but colleagues.

The constitutions of most of the other states declare the executive power to be vested in the governor, but are hardly through with outlining his functions before they provide for the erection of executive departments among which the greater part of executive power shall be parcelled out; so that the arrangement is, in effect, that of those states which declare the executive office to be 'in commission' by enumerating the officers who are to divide its duties.

994. **Full Legal, but no Hierarchical, Control.** — This, then, is the sum of the whole matter: the control of law is thorough and complete: statutes leave to no officer, either central or local, any considerable play of discretionary power: so far as possible they command every officer in every act of his administration. But no hierarchy stands between any officer and the law. The several functions of executive power

are segregated, — each official, so to say, serves his own statute. So thorough is the control attempted by legislation, — and so potent among us is the legal habit and conscience, the law-abiding sense, — that no official control, no hierarchical organization has been thought necessary.

Local Government.

995. **General Characteristics.** — The large freedom of action and broad scope of function given to local authorities is the distinguishing characteristic of the American system of government. Law is central, in the sense of being uniform and the command of the central legislature in each state; and its prescriptions are minute; but function and executive power are local. There is a single comprehensive statutory plan, but a host of unassociated deputies to carry it into effect, an infinite variety in the local application of its principles. General laws are given to the localities by state legislation, and these laws are generally characterized by a very great degree of particularity and detail of provision; but no central authority has executive charge of their application: each locality must see to it for itself that they are carried out.

996. **Duties of Local Government.** — The duties of local government include Police, Sanitation, the Care of the Poor, the Support and Administration of Schools, the Construction and Maintenance of Roads and Bridges, the Licensing of Trades, the Assessment and Collection of Taxes, besides the Administration of Justice in the lower grades, the maintenance of Court Houses and Jails, and every other affair that makes for the peace, comfort, and local good government of the various and differing communities of each commonwealth. In many places libraries are included among the institutions given into the charge of the officers of local government. Of course local officers look to state law for their authority; but practically state administration represents only the unifying scheme of local government. Local administration is *the* administration of the state.



997. **Local Varieties of Organization.** — Almost without exception the states which have been added to the original thirteen by whom the Union was formed have derived their local institutions, whether by inheritance or by imitation, from the mother-states of the Atlantic seaboard. Wherever New England settlers have predominated the *township* has taken quick rootage and had a strong growth; wherever Southern men have gone the *county* has found favor above other forms of local organization; wherever the people from the two sections have met and mixed, as in the early days they met and mixed in New Jersey and Pennsylvania, the same combination or mixture of institutions that is characteristic of the middle Atlantic states is found in full prominence. But in all cases the new foundations in the west have this common feature: they have all been in a greater or less degree artificially contrived. Towns have not grown up in the northwest for the same reasons that led to their growth in New England, in the days when isolation was necessary and when isolation of course involved compact and complete self-government (secs. 835–837): they have, on the contrary, been deliberately constructed in imitation of New England models. Neither have western counties been developed by processes of pioneer agricultural expansion such as made the irregular, and in a sense geographically natural, counties of Virginia (secs. 841–843): they have, on the contrary, been geometrically laid off in the exact squares of the government survey because the settlers wanted to reproduce by statute the institutions which in their old homes have been evolved by slow, unpremeditated colonial growth. The institutions of the admitted states, in a word, were transplanted by enactment, whereas the institutions of the original states were almost unconscious adaptations of old custom. It by no means follows that these newer institutions lack naturalness or vigor: in most cases they lack neither, — a self-reliant race has simply re-adapted institutions common to its political habit; but they do lack the individu-

ality and the native flavor often to be found in the institutions in whose likeness they have been made.

998. The differences of institution, then, which show themselves in the east between local government in New England, local government in the South, and local government in the central belt of Atlantic states extend also into the west. There, too, we find the three types, the township type, the county type, and the compound type which stands between the two; but the compound type is in the west naturally the most common: the westerner has had the sagacity to try to combine the advantages of all the experiments tried in the older states, rejoicing in being fettered by no hindering traditions, and profiting by being restrained by no embarrassing incapacity for politics.

Keeping these facts in mind, it will be possible to consider without confusion, the Township, the County, the School District, the Town, and the City as elements of local government in the United States. The different place and importance given to each of these organs in different sections may be noted as we proceed.

999. **The Township: Its Historical Origin.** — The township is entitled to be first considered in every description of local government in the United States not only because it is a primary unit of administration, but also by reason of its importance and because of its ancient and distinguished lineage. It is a direct lineal descendant from the primitive communal institutions which Cæsar and Tacitus found existing in the vigor of youth among the peoples living in the ancient seats of our race. The New England town was not an American invention; and the settlers upon the northern coasts did not adopt the town system simply because they were obliged to establish themselves in isolated settlements in a harsh climate and among hostile native tribes. We have seen (secs. 835–6) that they kept together in close settlements for religious purposes, for mutual defence, and for purposes of trade, and that

their settlements were completely isolated by stretches of wild primeval forest; but their form of government, or at least the talent and disposition for it, they brought with them, an inheritance of untold antiquity. Their political organization was simply a spontaneous reproduction of the ancient Germanic Mark (secs. 222, 652). In most cases they regarded the land upon which they settled as the property of the community, just as their remote barbarian ancestors had done; like those ancestors, they divided out the land among families and individuals or worked it in common as might be decided by public vote in general assembly, in open 'folk-moot' we may call it. This same 'town-meeting,' as they styled it, voted the common discipline, elected the officers, and made the rules of common government: each group of colonists constituted themselves a state with a sovereign primary assembly. They re-established, too, the old principles of folk-land. Whether they tilled their lands in common or not, they had always a communal domain, part of which was kept as open Common for the general pasturage, and the rest of which was given over in parcels, from time to time, for settlement. They were inventing nothing; they were simply letting their race habits and instincts have natural play. Their methods showed signs at almost every point, of course, of having been filtered through intervening English practices; but they rested upon original Teutonic principles.

1000. The exceptions to the principle of folk-land occurred where, as in the Hartford, Windsor, and Wethersfield settlements on the Connecticut, the land was held, not in common by the civil community, but in common by a sort of corporation of joint owners under whose supervision the new colonies were established. These joint owners were quite distinct from communal authorities.[1]

1001. **Absorption of the Town in Larger Units of Government.**—It was towns of this primitive pattern that were drawn together ultimately into the New England colonies of the later

[1] See Andrews, *The River Towns of Connecticut* (Johns Hopkins Studies, Seventh Series).

time by the processes I have already described (sec. 838); and of course in becoming parts of larger organizations they lost to some extent their independence of movement, as well as in some slight degree their individuality also. In some cases, as for instance in the coalescence of 'Connecticut' and New Haven (sec. 849), the establishment of central state legislative control over the towns took the shape of a mere confirmation to them of their old functions and privileges, and in this way fully recognized their elder and once sovereign place in the historical development of the commonwealth; but it in all cases necessarily resulted in their virtual subordination. It led also to the creation of new areas of local government. Towns were grouped, at first for judicial purposes only, into counties, and the counties came in time to furnish a more convenient basis for certain administrative functions once vested exclusively in the smaller areas. Great cities, too, presently grew up to demand more complex, less simply and directly democratic, methods than those of the towns. But no change has seriously threatened town organization with destruction: it is still the most characteristic and most vital element of local government in New England; and it still has substantially the same officers, substantially the same functions that it possessed at its foundation in America.

1002. Of course an influx of foreigners has in many places disturbed and even impaired the town system, and the cities, which draw to themselves so rapidly the rural population, but which are too big for the primitive methods of town government, are powerful disintegrating elements in the midst of the old organization; but the new adaptation and development of the township in the west, and the tendency to introduce it in some parts of the south, seem still to promise it honor and length of days.

1003. **Town-meeting.** — The sovereign authority, the motive power, of town government is the Town-meeting, the general assembly of all the qualified voters of the town, which has reminded so many admiring observers of the ancient Grecian

and Roman popular assemblies and of the *Landsgemeinde* of Switzerland. The regular session of this assembly is held once a year, usually in the Spring,[1] but extra sessions are held from time to time throughout the year as occasion arises, due notice being given both of the time of meeting and of the exact business to be considered. Town-meeting elects all officers, — its regular annual session being the session for elections, — and decides every affair of local interest.[2] It is presided over by a 'Moderator' and attended by the town officers, who must give full account of their administration, and who must set before the Meeting a detailed statement of the sums of money needed for local government. These sums, if approved, are voted by the Meeting and their collection ordered, on the prescribed basis of assessment. Everything that the officials and committees of the town have done is subject to be criticised, everything that they are to do is subject to be regulated by the Meeting.

1004. **The Town Officers.** — The officers of the town are certain 'Selectmen,' from three to nine in number, according to the size and needs of the town, who constitute the general executive authority for all matters not otherwise assigned; a Town Clerk, who is the keeper of the town records and registers; a Treasurer; Assessors, whose duty it is to make valuation of all property for tax assessment; a Collector of the taxes voted by the Meeting or required by the county and state authorities; a School Committee; and a variety of lesser officers of minor function, such as Constables, together with certain committees, such as library trustees, etc. Generally there are also overseers of the poor and surveyors of highways.

1005. To this corps of officers all the functions of local government belong. The county authorities cannot enter their

[1] In Connecticut in the autumn.

[2] In some of the coast towns (townships), as notably in Connecticut, the regulation of the use of the oyster beds is a very prominent question in town-meeting.

domain, but must confine themselves to the judicial duties proper to them and to such administrative matters as the laying out of inter-town roads, the issuing of certain county licenses, the maintenance of county buildings, etc., for the due oversight of which larger areas than the town seem necessary. County expenses are defrayed by taxes raised by the towns: the county authorities apportion such taxes, but lay none.

In Rhode Island the only county officials are those connected with the administration of justice.

1006. **The Township of the Northwest.** — The town may, therefore, be said to exist in New England in its historical character and simplicity, overshadowed here and there by great cities, and everywhere modified and partially subordinated by the later developments of state and county. In the *Northwest*, whither New England emigrants have gone, it has entered another phase and taken on another character, — a character which may perhaps foreshadow its ultimate organization should the country have at any future time the uniform practices of local government now dimly promised by certain incipient forces of institutional interchange and imitation.

1007. In the first place, the Northwestern township is more thoroughly integrated with the county than is the New England township: county and township fit together as pieces of the same organism. In New England the township is older than the county, and the county is a grouping of townships for certain purposes; in the Northwest, on the contrary, the county has in all cases preceded the township, and townships are divisions of the county. The county may be considered as the central unit of local government: townships as differentiations within it.

1008. The county preceded the township because the county furnishes, for our people, the natural basis of organization for a scattered agricultural population; the township came after- the suggestion of the New England settlers, as the



natural organization for a population become more numerous and drawn together into closer association.

1009. **Its Origin.** — As all the best authorities on this subject have pointed out, *school organization* supplied the beginnings of the township system in all the more newly settled portions of the country, and is now producing the seeds of it in the South. The western township has sprung out of the school as the New England township of the earliest days sprang out of the church. The government surveyor, who has everywhere preceded final settlement in the west, has in all cases mapped out the land in regular square plots which, for convenience, he has called 'townships,' and in every township Congress has reserved a square mile of land for the endowment of schools. This endowment had to be administered by the settlers, school organization had to be effected, the name township had already been given to the district so endowed, and there was, therefore, naturally school organization on the basis of the township. From this there eventually issued an equally natural growth of local political institutions.[1]

1010. **Spread of Township Organization.** — The development of the township has progressed almost in direct ratio with the development of local government: in many sections of the country, even where population is dense, county organization is still made to suffice for such districts as have not assumed the structure and privileges of village or city incorporation, but wherever any special effort has been made to perfect local rural organization for administrative purposes, the township has been accepted as the best model of political association.

1011. It has received its widest acceptance in such middle states as New York and Pennsylvania, and in the great Northwestern states of Michigan, Wisconsin, Illinois, and Minnesota. Elsewhere, in the Middle West, in Ohio, Indiana, and Kansas, for example; and in such states of

10 of *Local Government in Illinois*, by Dr. Albert Shaw (Johns
in Historical and Political Science, First Series).

the far West as California, it is less fully developed, and occupies a much more subordinate place as compared with the County. The County, indeed, may be said to be the prevalent unit of local government in California, as well as in Oregon, Nebraska, and Nevada.

1012. **Township Organization.** — The *organization* of the township outside of New England, of course, varies with its development. Where it is most vigorous there is the town-meeting exercising powers strictly defined and circumscribed by statute and somewhat less extensive than the powers of town-meeting in New England, but still covering a multitude of local interests and representing a very real control. Where it is less developed there is no town-meeting, but instead only the processes of popular election to local office. In all cases the 'selectmen' have disappeared: at least we find no officers bearing their name, and no officers possessing exactly their functions. Where the township is most completely organized we find one or more 'supervisors' standing at the front of township administration, who are clothed with the duties of overseers of the poor, who exercise oftentimes a certain control over the finances of the township, and who are, in general function, the presiding and directing authorities of the administration.

1013. In Michigan and Illinois a single supervisor presides over each township; and in the former state each supervisor is also tax assessor, while in the latter he is treasurer. In Wisconsin and Minnesota there are three supervisors in each township; in Ohio three nearly equivalent officers called 'trustees.'

1014. Where there are several supervisors or trustees in the township, it is common to associate them together as a Board, and under such an arrangement they very closely resemble the New England board of selectmen in their administrative functions. Township boards also exist under the laws of some states in which there is but a single supervisor for each township, being composed, usually, besides the supervisor, of such officers as the town clerk and the Justices of the Peace.

In Michigan such a board has rather extensive supervisory powers; in Illinois it is a committee of audit simply.

1015. The number of township officers of course varies with the degree of development to which the township system has attained. In Ohio, where the system is still more or less in germ, there are, besides the three trustees, no township officers save a clerk and a treasurer. In Michigan, even, where the township system is fully accepted, there is neither an assessor nor a collector of taxes, the supervisor acting as assessor and the treasurer as collector. In Illinois, on the other hand, there is always a very full corps of officers: supervisor, collector, assessor, clerk, commissioners of highways, school trustees, justices of the peace, constables, etc.

1016. The term of all officers except justices of the peace, road and school commissioners, and constables, is generally but a single year, as in New England; the terms of the other officers named are often three or four years.

1017. Where there is a town-meeting the officers are elected by it; where there is no town-meeting they are of course chosen by ballot.

1018. **The Township in the Middle Atlantic States.** — Of course it is reversing the historical order to speak of the townships of the middle Atlantic states after discussing the townships of the newer west; but it is not reversing the order of convenient exposition. The processes of formation are plainly visible in the west; in the east they are more complex and obscure, being the formations of history rather than of legislation.

1019. **The New York township** is like the townships of Michigan and Illinois in its structure and functions; but like because it is an original, not because it is a copy. Over it presides a single supervisor who is the treasurer and general financial officer of the area. It has its clerk, its assessor, its collector, its commissioners of highways, its constables, its justices of the peace. It has also special overseers of the poor. An annual town-meeting, under the presidency of the justices

of the peace, or of the town clerk, elects all officers, passes sundry by-laws, votes taxes for schools and poor-relief, and constitutes the general governing authority.

In counties containing 300,000 or more inhabitants there is a provision for the election of township officers by ballot.

1020. **The Pennsylvania Township.** — The New York township system suggested the system of the states about the lakes, and stands nearest in the order of development to the township of New England. The township of Pennsylvania, on the other hand, suggests the township system of the next lower belt of western states. In it there is no town-meeting, but only an executive machinery. A board of two or three supervisors holding for a term of three years presides over the township, and has as its most prominent function the care of highways. For the rest, there are the usual officers, with the somewhat uncommon addition of three auditors. Where the township is charged with the care of the poor, two special overseers are elected.

1021. **Origins of Local Government in the Middle States.** — Local government in New York, Pennsylvania, Delaware, and most of New Jersey runs back, as to a common source, to the system established in colonial times by the Duke of York as proprietor. Under that system the township was the principal organ of local government. Its officers were certain constables and overseers; and above the township was only an artificial 'Riding' presided over by a sheriff. Certain General Courts levied highway and poor rates, appointed overseers of highways, etc. After the period of the Duke's proprietorship, the development of local government in the several parts of his domain exhibited a considerable variety. The township retained its importance in New York, but further south, particularly in Pennsylvania, the county gained the superior place.

1022. **The Township in the South.** — Wherever, in the south, the principle of local taxation for local schools has been fully recognized, there the township has begun to show itself, at least in bud. Virginia, the oldest of the southern states, and in most respects the type of all the rest in institutional

development, has, since 1870, had the township system in full flower.

1023. **In the Virginia townships**, as in those of the middle west, there is no town-meeting, — all officers, down even to the constable, are elected at the polls. Each township has its single supervisor, but, as in Michigan, the supervisor has authority only as a member of a township board, on which the commissioner of roads and the assessor are associated with him. This board is the auditing and general financial authority of the township, has charge of highways, has the usual care of the township property, and the usual general oversight. The clerk of the township is *ex officio* treasurer, and must countersign the warrants of the board. There are special overseers of the poor, but county poor-houses receive paupers sent from the townships. For the rest, there is the usual collector, justice of the peace, and constable. As in New York, the supervisors of the townships collectively constitute the governing board of the county.

North Carolina, also, and West Virginia have adopted to some extent the township system.

The division of power between township and county can be most intelligibly discussed in connection with the following outline of county organization.

1024. **The County.** — The natural history of the county is best studied in the south, where, despite the partial, and in Virginia the complete formal, adoption of township organization, the county remains the chief, and almost the only organ of local order and government. We have seen (secs. 841, 842) how natural a basis of government it was for a wide-spread agricultural population. The county was imported into the west by southern settlers, but also found there at first its natural reason for existence in a similarly diffused population. New England immigration and new conditions of industrial and social combination have created the township within the county in the west, as they promise to create it in the south, also (see sec. 1022).

1025. In all cases it would seem the county was originated for judicial purposes, as an area in and for which courts were to be held, though in such confeder Connecticut

it was also in part the outgrowth of the union of different groups of once independent towns. In the south the county became also the single area for the administrative organization of local government, being given the functions elsewhere divided between the county and lesser areas like the township. In New England certain general functions of a limited character have been conferred upon it by subtraction from the townships. In the northwest, county and township have been created almost simultaneously and side by side, and are carefully integrated.

1026. The American county was of course in the first instance a frontier copy of the English shire; but, of course, the American county affords no analogy in its growth to the growth of its English prototype. The English shire in a great many instances traces its history back to the time when it was a separate Saxon kingdom, and may be said to have as natural boundaries as France; American counties, on the other hand, have all been deliberately 'laid out,' as judicial and administrative subdivisions, and have no independent historical standing.

1027. **The southern county,** which undertakes all of local administration, has, of course, a complete set of officers. At its head is a small board of *county commissioners.* Acting under the general superintendence of the commissioners there are generally a county treasurer, auditor, superintendent of roads, superintendent of education, and superintendent of the poor. On its judicial side, the county has its sheriff, its clerk, its ordinary or surrogate, its coroner, and its states-attorney, the latter generally acting for a judicial district inclusive of several counties. The functions of the county, of course, embrace the oversight of education, the maintenance of jails and poor-houses, the construction and repair of highways, and all local matters. County officers are in almost all instances elected by popular vote. Under the southern county system the sheriff is commonly tax-collector.

1028. **Where the township exists** there is great variety of county organization, almost the only point of common likeness

being the organization of justice. The county always has its sheriff, and generally its separate courts with the usual coroner and clerk. The variety exists in the domain of administrative structure. Sometimes, as in New York, Michigan, and Illinois, the county administrative authority is a board composed of the supervisors of all the townships; sometimes, as in Pennsylvania and Minnesota, the county authority is a board of three commissioners. In Wisconsin the county board consists of members each of whom is chosen by two or more townships. Where the county is given least power, as in New England, its administrative functions hardly extend beyond the maintenance of such county buildings as the jail and court-house, the granting of certain licenses, and the partial supervision of the highway system. In New York and the northwest the county authorities often undertake the relief of the poor, sometimes exercise an extensive control over the debt-contracting privileges of the smaller areas, often audit the accounts of local officers, and supervise taxation for purposes of equalization.

Where townships exist, then, the division of functions may be said to be as follows: the township is the area for the administration of schools, for the relief of the poor (unless by popular vote this function is given to the county), police, construction and maintenance of highways, sanitation; the county is the area for the administration of justice, for the maintenance of jails, courthouses, and sometimes poorhouses, for tax equalization, and often for the exercise of certain other general supervisory powers.

1029. **Villages, Boroughs, Cities.** — Counties and townships are areas of rural organization only; with the compacting of population in great towns and cities other and more elaborate means of organization become necessary, and a great body of constitutional and statutory law has grown up in the states concerning the incorporation of such urban areas. There is no municipal corporations act in any of our states such as that under which, in England, cities of all sizes may acquire the

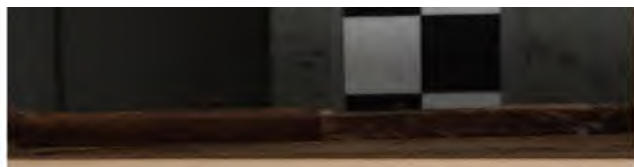
privileges and adopt the organization of full borough government (sec. 794): the largest towns are left, under our system, to depend for their incorporation upon special acts of legislation. The great cities of the country consequently exhibit a great variety of political structure, and even cities in the same state often differ widely in many material points of organization and function.

1030. The electors or freeholders of less populous districts are, however, in most of the states empowered to obtain a simple sort of urban organization and considerable urban powers, by certain routine processes, from the courts of law; *villages* (as they are called in New York), *boroughs* (as they are styled in Pennsylvania), *towns* (as they are sometimes designated in the south),[1] *cities of the lesser grades* (in states where they are classified according to population), may usually get from the courts as of course, upon proof of the necessary population and of the consent of freeholders or electors, the privilege of erecting themselves into municipal corporations under general acts passed for the purpose; just as private joint-stock companies may get leave to incorporate upon showing to the court evidence of the possession of the necessary membership, stock, or paid-up capital.

1031. The town or borough is of course, however, a public, not a private, corporation, receiving by delegation certain powers of government; and many states have left with their legislatures the power to create all public corporations by special act. The incorporation of towns is not, therefore, universally governed by general statute.

1032. **The Authorities of urban districts** thus erected into separate corporations succeed, generally, to all the powers of township officers within their area and constitute a local body apart, though no town or city ever altogether ceases to be a part of the county in which it lies. It continues to pay

[1] The name town when used in New England always means, not an urban district, but a township.



county taxes and its electors continue to take their part in the choice of county officials. The special organization which these statutory towns receive is unlike that of either county or township principally in this, that they have at the front of their government a representative, quasi-legislative, body, an elected council, that is, which within its sphere is a law-making authority.

1033. **A common model of organization** is: a mayor, president, or chief burgess; a small council of trustees, given extensive power of making by-laws, considerable power of taxation for local improvements as well as for local administration, and other powers of local direction which quite sharply differentiate it from the merely executive boards often found in the townships and always found in the counties; a treasurer; a clerk; a collector; a street commissioner; sometimes overseers of the poor; and generally such other minor officers as the council see fit to appoint.

1034. **Organization of Government in Cities.** — The difference between the organization of these smaller urban areas and the organization of great cities is a difference of complexity not only but often also a difference of kind. Cities, we have seen (sec. 953), are often given a separate judicial organization, being made in effect separate judicial circuits or counties, with their own courts, sheriffs, coroners, and state-attorneys. They are given also, of course, larger councils, with larger powers; a larger corps of officers; and greater independence than other local areas possess.

1035. **The council** of a great city usually consists of two sections or 'houses,' — a board of *aldermen* and a board of *common councilmen*, differing very much as the two houses of a state legislature differ, in the number and size of the districts which their members represent. In the cities of New York State, however, there is but a single legislative chamber, called sometimes the Board of Aldermen, sometimes the Common Council.

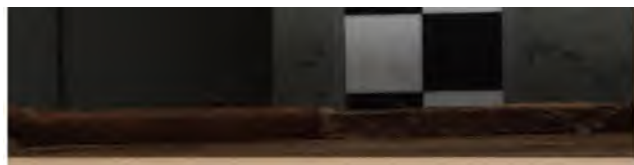
1036. These boards always constitute the law-making (or rather *ordinance*-making) and taxing power of the city; and always until recent years they have been constituted overseers of administration also, by being given the power to control it not only by withholding moneys,

but also through direct participation in the power of appointment to the minor city offices, — all those, that is to say, not filled by popular election. The chief officers of every city have usually been elected, but all others have, as a rule, been appointed by the mayor subject to confirmation by the city council. The tendency of all very recent legislation with reference to the constitution of city governments has been to concentrate executive power, and consequently executive responsibility, in the hands of the mayor, leaving to the council only its ordinance-making power and its function of financial control. Some of the most recent charters have even extended the appointing power of the mayor so as to include the most important executive offices of the city administration. It has been found impossible to prevent corrupt influences determining the action of councils upon appointments. A numerous body will, just because it is numerous, be practically irresponsible, and where there is irresponsibility, the temptation to immorality suffers little check.

1037. **School Administration.** — Wherever the public school exists there we find the School District the administrative area for educational purposes. Where the county system prevails the county is divided into school districts; where the township system prevails the township is divided into school districts. In every case there are district directors or trustees who control school administration, and control it so absolutely as to prevent in great part the existence of any uniform system of education for the whole state; but where the township system prevails there is generally more participation on the part of the people, gathered in district-meeting, in school administration, and generally a fuller power of local taxation.

1038. In New England recent years have been witnessing the disappearance of the school district in some states, and its absorption by the township. Thus in Maine and in Connecticut school administration is in many places being transferred from district to township officers, and the township is thereby being made the school area. This absorption is left, however, to local option.

1039. **In the Northwest** schools usually receive support from three distinct sources: from the land granted to each school district by the federal government; from a general state



tax for education, whose proceeds are distributed among the townships, to be further distributed by the township authorities among the districts; and from district taxes levied by the district directors. In New England there is generally state and township taxation for the support of the schools. In the south, under the county system, there is state taxation only, for the most part, save in certain exceptional localities, and in the greater towns.

1040. Nowhere is there sufficient centralization of control. State superintendents or other central educational authorities are without real administrative powers; county superintendents seldom have much authority; township trustees or committees, as a rule, have little more than a general supervision and power of advice; usually the directors of the smallest area have the greater part of the total of administrative authority, applying their *quota* of even the state taxes according to their own discretion. The result is, variety in the qualifications of teachers, variety in the method of their choice, variety in courses of study, variety in general efficiency.

1041. **Taxation.** — The most striking feature regarding local taxation in the United States is, the strict limitations put upon it by statute. Commonly no local authorities can tax beyond a certain fixed percentage of the appraised value of the property of their district. Under the county system, requisition is made upon the officers of the counties for the taxes voted by the legislature for state purposes, and the county boards raise them, together with the county taxes, upon the basis of the county assessment. Where the township exists, the process goes one step further: requisition is made upon the townships for both the state and county taxes, and the townships raise these, together with their own taxes, upon the basis of the assessment made by their own assessors.

1042. An effort is made in most of the states, however, to equalize assessments. Some county authority acts as *a board of equalization* with reference to the assessments returned by

the assessors of the several townships, and above the equalization boards of the counties there is generally a state board of equalization, whose duty it is to harmonize and equalize, upon appeal, taxation in the several counties. Appeals always lie from the local assessors to these boards of equalization. The system is, however, only partially successful. It has proved practically impossible, under the present system of localized authority, to avoid great varieties and inequalities of assessment: local officials try to cut down the shares of their districts in the general taxes as much as possible.

1043. **General Remarks on Local Government.** — Several features observable in our systems of local government taken as a whole are worthy of remark. (1) In the first place, outside of the towns and cities, the separately incorporated urban districts, there is a marked absence of representative, law-making bodies. Universally local officers and boards have merely executive powers and move within narrow limits set by elaborate statute law.

(2) In the second place, where there are local law-making bodies, they act under strict constitutional law: under charters, that is, possessing thus a strong resemblance, of *kind*, to state legislatures themselves.

(3) In the third place, central control of local authorities exists only in the enforcement, in the regular law courts, of charters and general laws: there is nowhere any central Local Government Board with discretionary powers of restriction or permission.

(4) In the fourth place, relatively to the central organs of the state, local government is the most vital part of our system: as compared either with the federal government or with local authorities, the central governments of the states lack vitality not only, but do not seem to be holding their own in point of importance. They count for much in legislation, but, so far, for very little in administration.

The Federal Government.

1044. **The Constitution of the United States** does not contain all the rules upon which the organization of the federal government rests. It says that there shall be a Congress which shall exercise the law-making power granted to the general



government; a President who shall be charged with the execution of the laws passed by Congress; and a Supreme Court which shall be the highest court of the land for the determination of what is lawful to be done, either by individuals, by the state governments, or by the federal authorities, under the Constitution and laws. It prescribes also in part the organization of Congress. But it does not command how Congress shall do its work of legislation, how the President shall be enabled to perform his great function, or by what machinery of officers and subordinate courts the Supreme Court shall be assisted in the exercise of its powers. It leaves all detail of operation to be arranged by statute: and statute accordingly plays a very important part in the organization of the government.

The Constitution thus furnishes only the great foundations of the system. Those foundations rest upon the same firm ground of popular assent that supports the several constitutions of the states. Framed by a federal convention and adopted by representative conventions in the states, it stands altogether apart from ordinary law both in character and sanction.

1045. **Amendment of the Constitution.** — The Constitution cannot be amended without the consent of two-thirds of Congress and three-fourths of the states. Amendments may be *proposed* in one of two ways: either (*a*) two-thirds of the members of each house of Congress may agree that certain amendments are necessary; or (*b*) the legislatures of two-thirds of the states may petition Congress to have a general convention called for the consideration of amendments, and such a convention, being called, may propose changes. In both cases the mode of *adoption* is the same. Every change proposed must be submitted to the states, to be voted upon either by their legislatures or by state conventions called for the purpose, as Congress may determine. Any amendment which is agreed to by three-fourths of the states becomes a part of the Constitution.

The fifteen amendments so far made to the Constitution were all proposed by Congress. No general constitutional convention has been called since the adjournment of the great body by which the Constitution was framed in 1787.

1046. None of the written constitutions of Europe are so difficult of alteration as our own. In Germany, as we have seen (sec. 404), a provision changing the imperial constitution passes just as an ordinary law would pass, the only limitation upon its passage being that fourteen negative votes in the *Bundesrath* will defeat it (14 out of 58). In France (sec. 318) constitutional amendments pass as ordinary laws do, except that they must be adopted by the two houses of the legislature acting, not separately in Paris, but jointly at Versailles, as a National Assembly. In Switzerland such amendments must pass both houses of the federal legislature and must also be approved, in a popular vote, by a majority of the voters, *and* by a majority of the Cantons (sec. 556). In England the distinction between constitutional law and statute law can hardly be said to exist (see sec. 730).

See, also, for a further exposition of constitutional differences between modern states, Chap. XII.

1047. **The Federal Territory.** — The territory of the United States is of two different sorts: there is (*a*) the District of Columbia, which the nation owns as the seat of its government, and the arsenals and dock-yards, which it has acquired from the states for military purposes; and (*b*) the great national property, the territories, which the federal authorities hold in trust for the nation as a seed-bed for the development of new states.

1048. **The District of Columbia.** — It would have been inconvenient for the federal government to have no territory of its own on which to build its public offices and legislative halls, and where it could be independent of local or other state regulations. The Constitution itself therefore provided that Congress should have exclusive authority within any district not more than ten miles square which any state might give the federal government for its own uses. Acting upon this hint, Maryland and Virginia promptly granted the necessary territory, it having been decided to establish the seat of govern-



ment upon the Potomac. The home-land of the federal government, thus acquired, was laid out under the name of the *District of Columbia :* there the public buildings were erected, and there, after the removal of the government offices thither in 1800, the city of Washington grew up.

1049. The first Congress of the United States met in New York City; there the first President was inaugurated, and the organization of the new government effected. In 1790 it was determined that the federal officers should live and Congress meet in Philadelphia (as the Continental Congresses and the congress of the Confederation had done) for ten years; after that, in the district specially set apart for the use of the federal government.

1050. The creation of this federal home-plot is a feature peculiar to our own federal arrangements. Berlin, of course, is the capital of Prussia, not the exclusive seat, or in any sense the property, of the imperial government. Berne, too, is cantonal, not federal, ground. Our government would have been in the same case as those of Germany and Switzerland had our federal authorities remained the guests of New York or Pennsylvania.

1051. The several *arsenals and dock-yards* established by the federal government in different parts of the Union are built upon land granted to the federal government by the states in which they lie for such special use, and remain the property of that government only so long as used for the purposes contemplated in the grants.

1052. **The Territories.** — As the different parts of our vast national domain have been settled it has been divided, under the direction of Congress, into portions of various sizes, generally about the area of the larger states, though sometimes larger than any state save Texas. These portions have been called, for want of a better name, *Territories,* and have been given governments constituted by federal statute. First they have been given governors and judges appointed by the President; then, as their population has become numerous and sufficiently settled in its ways of living, they have been given legislatures chosen by their own people and clothed with the power to make laws subject to the approval of Congress; finally, upon becoming still more developed, they have been granted as

full law-making powers as the states. The territorial stage of their development passed, the most important of them have one by one been brought into the Union as states.

Until 1803 the only territory of the United States consisted of the lands this side the Mississippi which had belonged to the thirteen original states individually, and had by them been granted to the general government. In 1803 the vast tract known as 'Louisiana' was bought; in 1848, by conquest, and in 1852, by negotiation, the Pacific coast lands were acquired from Mexico; in 1846 the right of the United States to a portion of "the Oregon country" was finally established.

1053. **The post-offices, federal court chambers, custom houses,** and other like buildings erected and owned by the general government in various parts of the country are held by the government upon the ordinary principles of ownership, just as they might be held by a private corporation. Their sites are not separate federal territory.

1054. **Congress.** — As in the states, so in the federal government, the law-making power is vested in a double legislature, a Congress consisting of a Senate and a House of Representatives. Unlike the two houses of a state legislature, however, the two houses of Congress have distinct characters: the Senate differs from the House not only in the number of its members, but also in the principle of its composition. It represents the federal principle upon which the government rests, for its members represent the states. The House of Representatives, on the other hand, represents the national principle upon which also the government has now been finally established, without threat of change: its members represent the people.

1055. **The Senate.** — The Senate consists of two representatives from each of the states of the Union. It has, therefore, the states being forty-two in number, eighty-four members.[1] Each senator is elected, for a term of six years, by the legislature of the state which he represents; and a state legislature is free to choose any one as senator who has been a citizen of

[1] Since the admission of Washington, Montana, North Dakota, and South Dakota, which became states Nov. 2–12, 1889.

the United States nine years, who has reached the age of thirty, and who is at the time of the election a resident of the state which he is chosen to represent.

1056. The Constitution directed that, immediately after coming together for its first session, the Senate should divide its members, by lot, as nearly as it could into three equal groups; that the members of one of these groups should vacate their seats after the expiration of two years, the members of another after the expiration of four years, and the members of the third after the expiration of six years; after which arrangement had been accomplished, the term of every senator was to be six years as provided. It was thus brought about that one-third of the membership of the Senate is renewed by election every two years. The result is, that the Senate has a sort of continuous life, — no one election year affects the seats of more than one-third of its members.

1057. The Senate is, as I have said, the *federal* house of Congress, its members represent the states as the constituent members of the Union. They are not, however, in any sense delegates of the governments of the states. They are not subject to be instructed as to their votes, as members of the German *Bundesrath* are, by any state authority (sec. 405), not even by the legislatures which elected them; each senator is entitled and expected to vote according to his own individual opinion. Senators, therefore, may be said to represent, not the governments of the states, but the people of the states organized as corporate bodies politic.

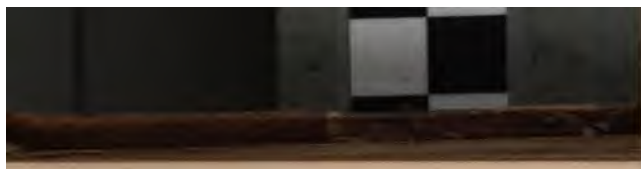
1058. There is no rule which obliges senators from the same state to vote together, after the fashion once imperative in the Congress of our own Confederation (sec. 866), and still imperative in the German *Bundesrath* (sec. 406), — each senator represents his state, not in partnership, but singly.

1059. The *equal* representation of the states in the Senate, of course, more strictly conforms to the federal principle than does the unequal representation characteristic of the German *Bundesrath* (sec. 406); but the rule observed in Germany, that the representatives of each state must vote together, must, in turn, be allowed to be more strictly consistent with the idea of state representation than is the rule of individual voting followed in our Senate.

1060. **The Vice-President of the United States** is president of the Senate. Unless the President die, this is the only function of the Vice-President. He is not a member of the Senate, however; he simply presides over its sessions. He has a vote only when the votes of the senators are equally divided upon some question and his vote becomes necessary, therefore, for a decision. If the President die, he becomes President.

1061. **Organization of the Senate.** — The Senate makes its own rules of procedure, the Vice-President being of course bound to administer whatever rules it adopts. Naturally the internal organization of the body is the matter with which its rules principally concern themselves, and the most important feature of that organization is the division of the members of the Senate into standing committees; into small groups, that is, to each of which is entrusted the preparation of a certain part of the Senate's business. The Senate itself would not, of course, have time to look into the history and particulars, the merits and bearings, of every matter brought before it; these committees are, therefore, constituted to act in its stead in the preliminary examination and shaping of the measures to be voted on. Whenever any proposal is made concerning any important question, that proposal is referred to the standing committee which has been commissioned to consider questions of the particular class to which the proposed action belongs. The committee takes the proposal and considers it, in connection with all other pending proposals relating to the same subject, and reports to the Senate what it thinks ought to be done with reference to it, — whether it is advisable to take any action or not, and if it is advisable to act, what action had best be taken.

Thus there is a Committee on Finance, to which all questions affecting the revenue are referred; a Committee on Appropriations, which advises the Senate concerning all votes for the spending of moneys; a Committee on Railroads, which considers all railroad questions; a Committee on Foreign Affairs, which prepares for consideration all questions touching our relations with foreign governments, etc., etc.



1062. **Influence of the Standing Committees.** — Its standing committees have, of course, a very great influence upon the action of the Senate. The Senate is naturally always inclined to listen to their advice, for each committee necessarily knows much more about the subjects assigned to it for consideration than the rest of the senators can know. Its committee organization may be said to be of the essence of the legislative action of the Senate: for of course the leadership to which a legislative body consigns itself is of the essence of its method and must affect, not the outward form merely, but the whole character also of its action. Under every great system of government except our own, leadership in legislation belongs for the most part to the ministers, to the Executive, which stands nearest to the business of governing; it is a central, and, as evidenced by its results, extremely important characteristic of our system that our legislatures *lead themselves*, or, rather, that they are led along the several lines of legislation by separate and disconnected groups of their members.

1063. **The Senate and the Executive.** — One of the chief uses of the committees is to obtain information for the Senate concerning the affairs of the government. But, inasmuch as the executive branch of the government is quite separate from Congress, it is often very difficult for the Senate to find out through its committees all that it wishes to know about the condition of affairs in the executive departments. The action of the two houses upon some questions must of course be greatly influenced, and should be greatly influenced, by what they can learn of administrative experience in the departments in such matters, and the Senate, as well as the House also, has the right to ask what questions it pleases of executive officers, either through its committees or by requiring a written report to be made directly to itself by some head of department. Upon financial questions, for example, the Senate or its Finance Committee must constantly wish to know the experience of the Treasury. But it is not always easy to get legislative questions fully and correctly answered: for the officers of the government are in no way responsible to either house for their official conduct: they belong to an entirely separate and independent branch of the government: only such high crimes and misdemeanors as lay them open to impeach-

ment expose them to the power of the houses. The committees are, therefore, frequently prevented from doing their work of inquiry well, and the Senate has to act in the dark. Under other systems of government, as we have seen (secs. 327, 328, 422 et seq., 464, 533, 686–9, etc.), the ministers are always present in the legislative bodies to be questioned and dealt with directly, face to face.

1064. **The President Pro Tempore.** — It is the practice of the Senate to make itself independent of all chances of the Vice-President's absence by electing statedly from its own membership a president *pro tempore*, to act in case of the absence or disability of the Vice-President.

1065. **The House of Representatives.** — The House of Representatives represents, not the states, but the people of the United States. It represents them, however, not in the mass, but by states; representation is apportioned among the states severally according to population, and no electoral district crosses any state boundary.

1066. **Apportionment of Representatives.** — Congress itself decides by law how many representatives there shall be; it then divides the number decided upon among the states according to population; after which each state is divided by its own legislature into as many districts as it is to have representatives, and the people of each of these districts are entitled to elect one member to the House. The only limitation put by the Constitution itself upon the number of representatives is, that there shall never be more than one for every thirty thousand inhabitants. The first House of Representatives had, by direction of the Constitution itself, sixty-five members, upon the proportion of one to every thirty-three thousand inhabitants. The number has, of course, grown, and the proportion decreased, with the growth of population. A census is taken every ten years, and the rule is to effect readjustments and a redistribution of representation after every census.

At present there are three hundred and fifty-six members in the House, and the states are given one member for every 173,900 of their inhabitants. In cases where a state has many thousands more than an even number of times that many inhabitants, it is given an additional mem-

ber to represent the balance. Thus, if it have four times 154,325 inhabitants, and a very large fraction over, it is given five members instead of four only. If any state have less than 154,325, it is given one member, notwithstanding, being entitled to at least one by constitutional provision.

There are at present seven states which have but one representative apiece; namely, Delaware, Colorado, Nevada, Oregon, Washington, Montana, and North Dakota. But these states, like the rest, have two senators each.

The reason for allowing a state an extra representative when there is a large fraction remaining over after a division of its population by the standard number 154,325, is, of course, that the apportionment of representatives is made according to states, and not by an even allotment among the people of the country taken as a whole, and that under such a system a perfectly equal division of representation is practically impossible. Congress makes the most equitable arrangement that is practicable each time that it re-apportions the membership of the House upon the basis of the decennial census which Congress directs to be taken for this purpose in pursuance of a special constitutional command.

1067. **Elections to the House.** — Any one may be chosen a representative who has reached the age of twenty-five years, has been a citizen of the United States for seven years, and is at the time of his election an inhabitant of the state from one of whose districts he is chosen. The term of a representative is two years: and two years is also the term of the whole House; for its members are not chosen a section at a time, as the senators are; the whole membership of the House is renewed every second year. Each biennial election creates 'a new House.'

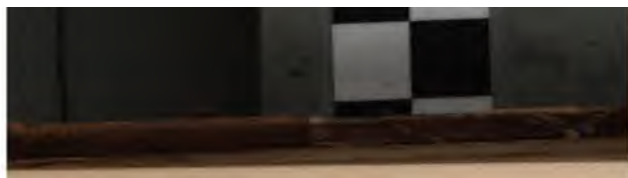
1068. Although the Senate has a continuous life, we speak habitually of different 'Congresses,' as if a new *Congress*, instead of a new House of Representatives merely, were chosen biennially. Thus the Congress of 1887–'89 was known as the fiftieth Congress, because the House of Representatives of that period was the fiftieth that had been elected since the government was established.

1069. Federal law does not determine who shall vote for members of the House of Representatives. The Constitution

provides, simply, that all those persons in each state who are qualified under the constitution and laws of the state to vote for members of the larger of the two houses of the state legislature may vote also for members of the House of Representatives of the United States. The franchise is regulated, therefore, entirely by state law.

1070. **In the fourteenth amendment** to the Constitution (passed 1866–'68) a very great pressure is, by intention at least, brought to bear upon the states to induce them to make their franchise as wide as their adult male population. For that amendment provides that, should any state deny to any of its male citizens who are twenty-one years of age the privilege of voting for members of the more numerous branch of its own legislature (and thus, by consequence, the privilege of voting for representatives in Congress), for any reason except that they have committed crime, its representation in Congress shall be curtailed in the same proportion that the number of persons so excluded from the franchise bears to the whole number of male citizens twenty-one years of age in the state. This provision has in practice, however, proved of little value. It is practically impossible for the federal authorities to get at the facts necessary to ascertain any such proportion.

1071. **Organization of the House.** — The House, like the Senate, has its own rules, regulative of the number and duties of its officers and of its methods of doing business; and these rules, like those of the Senate, are chiefly concerned with the creation and empowering of a great number of standing committees. The committees of the House are not, however, elected by ballot, as the committees of the Senate are; they are appointed by the presiding officer of the House, the 'Speaker'; and this power of the Speaker's to appoint the committees of the House makes him one of the most powerful officers in the whole government. For the committees of the House are even more influential than those of the Senate in determining what shall be done with reference to matters referred to them: they as a matter of fact have it in their power to control almost all the acts of the House. The Senate, being a comparatively small body, has time to consider fully



the reports of its committees, and generally manages to control its own conclusions. But the House is too large to do much debating: it must be guided by its committees or it must do nothing. It is this fact which makes the Speaker's power of appointment so vastly important: he determines who shall be on the committees, and the committees determine what the House shall do. He nominates those who shape legislation.

1072. The appointing power of the Speaker often makes his election a very exciting part of the business of each new House: for he is always selected, of course, with reference to what he will do in constituting the principal committees.

1073. The House of Representatives is not given a president by the Constitution, as the Senate is. It elects its own presiding officer, whose name, of 'Speaker,' is taken from the usage of the English House of Commons, whose president was so called because whenever, in the old days, the Commons went into the presence of the king for the purpose of laying some matter before him, or of answering a summons from him, their president was their spokesman or Speaker. This name is used also in the legislative bodies of all the English colonies, — wherever, indeed, English legislative practices have been directly inherited.

1074. The House has so many standing committees that every representative is a member of one or another of them, — but many of the committees have little or nothing to do: some of them, though still regularly appointed, have no duties assigned them by the rules. The most important committee is that on Appropriations, which has charge of the general money-spending bills introduced every year to meet the expenses of the government, and which, by virtue of its power under the rules to bring its reports to the consideration of the House at any time, to the thrusting aside of whatever matter, virtually dominates the House by controlling its use of its time. Special appropriation bills, which propose to provide moneys for the expenses of single departments, — as, for example, the Navy Department or the War Department, — are, by a recent rule of the House, taken out of the hands of the Committee on Appropriations and given to the committees on the special departments concerned. Scarcely less important than the Committee on Appropriations, though scarcely so busy as it, is the Committee on Ways and Means, which has charge of questions of taxation. It is, of course, to the appointment of such committees that the Speaker pays most attention. Through them his influence is most potent.

1075. Some members of the House are considered to be entitled, because of their long service and experience in Congress, to be put on important committees, and on every committee there must be representatives of both parties in the House. But these partial limitations upon the Speaker's choice do not often seriously hamper him in exercising his preferences.

1076. The House has to depend, just as the Senate does, upon its standing committees for information concerning the affairs of the government and the policy of the executive departments, and is just as often and as much embarrassed because of its entire exclusion from easy, informal, and regular intercourse with the departments. They cannot advise the House unless they are asked for their advice; and the House cannot ask for their advice except indirectly through its committees, or formally by requiring written reports.

1077. **Acts of Congress.** — In order to become a law or Act of Congress a bill must pass both houses and receive the signature of the President. Such is the ordinary process of legislation. But the President may withhold his signature, and in that case the measure which he has refused to sanction must receive the votes of two-thirds of the members of each house, given upon a re-consideration, before it can go upon the statute book. The President is given ten days for the consideration of each measure. If he take no action upon it within the ten days, or if within that period he sign it, its provisions become law; if within the ten days he inform Congress by special message that he will not sign the bill, returning it to the house in which it originated with a statement of his reasons for not signing it, another passage of the measure by a majority of two-thirds in each house is required to make it a law.

There are, therefore, three ways in which a bill may become law: either (*a*) by receiving the approval of a majority in each house, and the signature of the President, appended within ten days after its passage by the houses; or (*b*) by receiving the approval of a majority in each house, and not being acted upon by the President within ten days after its passage; or (*c*) by receiving the approval of two-thirds of each

house after having been refused signature by the President within ten days after its passage by a majority in each house. If Congress adjourn before the expiration of the ten days allowed the President to consider bills sent him, such bills lapse unless he has signed them before the adjournment.

1078. Neither house can do any business (except send for absent members or adjourn) unless a majority of its members are present, — a majority being in the case of all our legislatures, both state and federal, the necessary *quorum*.

1079. In the practice of some foreign legislatures the quorum is much less than a majority of the members. In the English House of Commons, for instance, it is only forty members, although the total number of members of the House of Commons is six hundred and seventy.

1080. When it is said that under certain circumstances a bill must be passed by a vote of two-thirds in order to become a law, it is understood to mean that it must be voted for by two-thirds of the members *present*, not necessarily by that proportion of the whole membership of the body. In the case of bills which the President refuses to sign, however, the Constitution expressly says that it cannot be made law unless a second time passed by *two-thirds of each House*.

1081. A bill may 'originate' in either house, unless it be a bill relating to the raising of revenue. In that case it must originate in the House of Representatives, though the Senate may propose what amendments it pleases to a revenue bill, as to any other which comes to it from the House.

Of course, if one of the houses pass a bill, and the other house amend it, the changes so proposed must be adopted by the house in which the bill originated before it can be sent to the President and be made a law. When the two houses disagree about amendments they appoint conference committees; that is to say, each house appoints a committee to consult with a similar committee appointed by the other house, to see what can be done towards bringing about an agreement between the two houses upon the points in dispute.

1082. **The Federal Judiciary: its Jurisdiction.** — The Judiciary of the United States consists of a Supreme Court, Circuit Courts, and District Courts. Its organization and functions rest more than do those of either of the other branches

of the general government upon statute merely, instead of upon constitutional provision. The Constitution declares that "the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may, from time to time, ordain and establish," and that "the judges, both of the supreme and inferior courts, shall hold their offices during good behavior and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office." It provides also that the judicial power of the federal government shall extend to all cases in law or equity which may arise under the Constitution, laws, or treaties of the United States; to all cases affecting ambassadors, other public ministers, and consuls; to all admiralty and maritime cases; to controversies in which the United States is a party, controversies between two or more states, between a state and citizens of another state (the state being the suitor), between citizens of different states, between citizens of the same state claiming lands under grants from different states, and between a state or its citizens and foreign states, citizens, or subjects. And it directs that in cases affecting ambassadors, other public ministers and consuls, and in cases in which a state is a party the supreme court shall have original jurisdiction; while in all other cases it is to have appellate jurisdiction only, "with such exemptions, and under such regulations, as the Congress shall make."

1083. The judicial power of the federal government is thus made to embrace two distinct classes of cases: (*a*) those in which it is manifestly proper that its authority, rather than the authority of a state, should control, *because of the nature of the questions involved:* for instance, admiralty and maritime cases, navigable waters being within the exclusive jurisdiction of the federal authorities, and cases arising out of the Constitution, laws, or treaties of the United States or out of conflicting grants made by different states. (*b*) Those in which, *because of the nature of the parties to the suit*, the state courts could not properly be allowed jurisdiction, cases affecting, for instance, foreign ambassadors, who are accredited to the government of the United States and with whom our

only relations are national relations, whose privileges rest upon the sovereignty of the states they represent; or cases in which the state courts could not have complete jurisdiction because of the residence of the parties; for instance, suits arising between citizens of different states.

It is always open to the choice of a citizen of one state to sue a citizen of another state in the courts of the latter's own domicile, but the courts of the United States are the special forum provided for such cases.

1084. **Power of Congress over the Judiciary.** — But these provisions of the Constitution leave Congress quite free to distribute the powers thus set forth among the courts for whose organization it is to provide, and even, if it so chooses, to leave some of them entirely in abeyance. In other words, the Constitution defines the sphere of the judicial power of the United States, while Congress determines how much of that sphere shall be occupied, by what courts and in what manner, subject to what rules and limitations.

With regard to the organization of the judiciary Congress determines not only what courts shall be created inferior to the supreme court, but also of what number of judges the supreme court shall consist, what their compensation and procedure shall be, and what their specific duties in the administering of justice. It might also determine, should it see fit, what qualifications should be required of all occupants of the supreme bench.

1085. **The Existing Federal Courts.** — In pursuance of these powers, Congress has passed the Judiciary Act of September, 1789, and the Acts amendatory thereto upon which the national judiciary system now rests. As at present constituted, *the supreme court* consists of a chief justice and eight associate justices. It is required to hold annual sessions in the city of Washington, — sessions which begin on the second Monday of each October, — any six of the justices constituting a quorum. Next below the supreme court are a set of *circuit courts.* These are, in theory, courts held in different parts of the country by the justices of the supreme court sit-

ting separately; but in reality the business of the supreme court is so great in amount and so engrossing in character that the justices can by no means regularly attend the sessions of the circuit courts. The area of the United States (exclusive of the territories) is divided into nine circuits, one justice of the supreme court is assigned, by the appointment of the court itself, to each of these circuits, and in addition special circuit judges are appointed who act quite independently of the justices, often holding court separately, in another part of the circuit, at the same time that the justices are themselves holding circuit court. The circuits are divided into districts, which, like Congressional districts, never cross state lines; and for each of these districts there has been established a district court. Some of the less populous states constitute each a single district; others are divided into two, while still others furnish sufficient business to warrant their being divided into three. The district courts are the lowest courts of the federal series. The circuit courts sit in the several districts of each circuit successively, and the law requires that each justice of the supreme court shall sit in each district of his circuit at least once every two years.

1086. **The division of jurisdiction** between the circuit and district courts is effected by act of Congress; and, inasmuch as Congress has not seen fit to vest in the courts complete jurisdiction over *all* cases arising under the Constitution, laws, and treaties of the United States, but has given to each court power in certain specified cases, and left the rest in abeyance, it would be impossible to give in brief compass a detailed account of the jurisdiction of the several courts. It must suffice for present purposes to say, that the district courts are given cognizance of certain civil cases within the grant of the Constitution, subject to appeal to the circuit courts when the sum involved exceeds $50; that they have exclusive jurisdiction of admiralty and maritime cases, an appeal lying to the circuit courts; and that as regards crimes punishable by federal law, their jurisdiction is concurrent with that of the circuit courts, except in case of capital offences, over which the circuit courts alone have jurisdiction. The circuit courts are given appellate jurisdiction over the district courts; original jurisdiction in



civil cases such as are contemplated by the Constitution when the matter in dispute exceeds $500 in value; and unlimited criminal jurisdiction over cases falling within the purview of federal law.

1087. **In criminal cases** there is, generally speaking, no appeal. In civil cases, appeal from the district to the circuit courts can be taken only when the matter in dispute exceeds $50 in value, from the circuit courts to the supreme court only when it exceeds $5000, except that cases of certain exceptional, specified classes may be appealed without respect to the amount involved. Any case which involves the interpretation of the Constitution can be taken to the supreme court, however small the sum in dispute.

1088. **All Judges of the United States** are appointed by the President, with and by the consent and advice of the Senate, to serve during good behavior. There are in all sixty federal judicial districts, and for each of these a special district judge is appointed, though in large, thinly populated sections of the country it has sometimes been customary to have one judge hold court in several districts.

1089. Federal judges of the inferior courts are, so to say, interchangeable. When necessary, a district judge can go into another district than his own and either aid or replace the district judge there; a district judge may also, when it seems necessary for the dispatch of business, sit as circuit judge; and a circuit judge may, in his turn, upon occasion hold district court. This seems the less anomalous when it is remembered that the earliest arrangement was, for the district judges to hold circuit court always in the absence of the justices of the supreme court from circuit, or in conjunction with them, and that special circuit judges were appointed only because of the necessity for more judges consequent upon a rapid increase of federal judicial business.

1090. The salary of the chief justice of the United States is $10,500, that of each of the other justices, $10,000. Circuit court judges receive $6000, and district judges from $3500 to $5000.

1091. **The District Attorney and the Marshal.** — Almost every district has its own federal *district attorney* and its own United States *marshal*, both of whom are appointed by the President. It is the duty of the federal district attorney to prosecute all offenders against the criminal laws of the United

States, to conduct all civil cases instituted in his district in behalf of the United States and to appear for the defence in all cases instituted against the United States, to appear in defence of revenue officers of the United States where they are sued for illegal action, etc. The marshal is the ministerial officer of the federal circuit and district courts. He executes all their orders and processes, arrests and keeps all prisoners charged with criminal violation of federal law, etc., and has within each state the same powers, within the scope of United States law, that the sheriff of that state has under the laws of the state. He is the federal sheriff.

1092. The orders and processes of a state court are binding and operative only within the state to which the court belongs; the orders and processes of United States courts, on the contrary, are binding and operative over the entire Union.

1093. **The courts of the District of Columbia and of the territories** are courts of the United States, but they are not federal courts; they bear, so far as their jurisdiction is concerned, the character of state and federal courts united. The only laws of the territories and of the District of Columbia are laws of the United States, inasmuch as the legislatures of the territories act under statutory grant from Congress.[1] The territorial legislatures are, so to say, commissioned by Congress; and the laws which they pass are administered by judges appointed by the President.

1094. The territorial courts and the courts of the District of Columbia do not come within the view of the Constitution at all. With reference to them Congress acts under no limitations of power whatever. The rule of tenure during good behavior, for example, which applies to all judges of the United States appointed under the Constitution, does not apply to judges of the territories or of the District of Columbia. The term of office of territorial judges is fixed at four years. The federal courts sitting in the states, and the United States courts established in the territories, ought not to be thought of as parts of the same system, although the supreme court is the highest tribunal of appeal for both.

[1] Congress early enacted that the people of the District of Columbia should continue to live under the laws which had previously had force in the District when owned by Virginia and Maryland.

1095. **The procedure of a federal court** follows, as a rule, the procedure of the courts of the state in which it is sitting; and state law is applied by the courts of the United States in all matters not touched by federal enactment. Juries are constituted, testimony taken, argument heard, etc., for the most part, according to the practice of the state courts; so that, so far as possible, both as regards the outward forms observed and the principles applied, a federal court is domestic, not foreign, to the state in which it acts.

1096. It is not within the privilege of Congress to delegate to the courts of the states the functions of courts of the United States; for the Constitution distinctly provides that, besides the supreme court, there shall be no court authorized to exercise the judicial powers of the United States except such as Congress "may, from time to time, ordain and *establish*." The adoption of state courts by Congress is, of course, excluded by plain implication. A very interesting contrast is thus established between the federal judicial system of the United States and the federal judicial systems of Germany and Switzerland (secs. 436, 559).

1097. **The Federal Executive.** — "The executive power," says the Constitution, "shall be vested in a President of the United States of America," who "shall hold his office during a term of four years." As a matter of fact, of course, it has proved practically impossible for a single man actually to exercise the whole executive power; the President is assisted by numerous heads of departments to whom falls so large a part of the actual duties of administration that it has become substantially correct to describe the President as simply presiding over and controlling by a general oversight the execution of the laws; which is doubtless all that the sagacious framers of the Constitution expected.

The Vice-President has no part in the executive function. He is the President's substitute, and is chosen at the same time and in the same manner that the President is chosen.

1098. **Election of a President.** — The choice is not direct

by the people, but indirect, through electors chosen by the people. In each state there are elected as many electors as the state has representatives and senators in Congress, the "electoral vote" of each state being thus equal to its total representation in Congress.

The electors are voted for on the Tuesday following the first Monday of November in the year which immediately precedes the expiration of a presidential term. They assemble in the several state capitals to cast their votes on the first Wednesday of the December following. Their votes are counted in the houses of Congress sitting in joint session on the second Wednesday of the following February. The President is inaugurated on the fourth of March next.

1099. **Practical Operation of the Plan: the Party Conventions.** — The theory of this arrangement is that each elector really exercises an independent choice in the votes which he casts, voting for the men whom his own judgment has selected for the posts of President and Vice-President. In fact, however, the electors only register party decisions made during the previous summer in national conventions. Each party holds during that summer a great convention composed of party delegates from all parts of the Union, and nominates the candidates of its choice for the presidency and vice-presidency. The electors, again, are, in their turn, chosen according to the selections of party conventions in the several states; and the party which gains the most electors in the November elections puts its candidates into office through their votes, which are cast as a matter of course in obedience to the will of the party conventions. The party conventions are by far the most important part of the machinery of election.

1100. **Qualifications for the Office of President.** — "No person, except a natural born citizen, or a citizen of the United States at the time of the adoption of this constitution shall be eligible to the office of president; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the



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United States."[1] In respect of age there is here only a slight advance upon the qualification required of a senator; in respect of citizenship it is of course very much more rigorous than in the case of members of Congress.

1101. It is provided by the Constitution that the compensation received by judges of the United States shall not be diminished during their terms of office; concerning the President, whose tenure of office is much briefer, it is provided that his compensation shall neither be diminished *nor increased* during his term.

1102. **Duties and Powers of the President.** — It is the duty of the President to see that the laws of the United States are faithfully executed; he is made commander-in-chief of the army and navy of the United States, and of the militia of the several states when called into the actual service of the United States; he is to regulate the foreign relations of the country, receiving all foreign ministers and being authorized to make treaties with the assent of two-thirds of the Senate; and he is to appoint and commission all officers of the federal government. The Constitution makes all his appointments subject to confirmation by the Senate; but it also gives Congress the power to remove from the superintending view of the Senate the filling of all inferior official positions by vesting the appointment of such subordinate officers as it thinks proper in the President alone, in the courts of law, or in the heads of departments. As a matter of fact, legislation has relieved the Senate of the supervision of the vast majority of executive appointments. The confirmation of the Senate is still necessary to the appointment of ambassadors, other public ministers, and consuls, of judges of the courts of the United States, of the chief departmental officials, of the principal post-office and customs officers, — of all the more important servants of the general government: but these of course constitute only a minority of all the persons receiving executive appointment: the majority are appointed without legislative oversight.

[1] Constitution, Art. II., sec. i., par. 6.

1103. The unfortunate, the demoralizing influences which have been allowed to determine executive appointments since President Jackson's time have affected appointments made subject to the Senate's confirmation hardly less than those made without its co-operation: senatorial scrutiny has not proved effectual for securing the proper constitution of the public service. Indeed, the "courtesy of the Senate," — the so-called "courtesy" by which senators allowed appointments in the several states to be regulated by the preference of the senators of the predominant party from the states concerned, — at one time promised to add to the improper motives of the Executive the equally improper motives of the Senate.

1104. **Reform of Methods of Appointment to Federal Offices.** — The attempts which have been made in recent years to reform by law the system of appointments have not been directed towards the higher offices filled with the consent of the Senate, but only towards those inferior offices which are filled by the single authority of the President or of the heads of the executive departments; have touched in their results, indeed, only the less important offices. The Act which became law in June, 1883, and which is known as the "Pendleton Act," may be said to cover only 'employees': it does not affect, that is, any person really *in authority*, though it does affect a large body of federal servants. It provides, in brief, for the appointment by the President, by and with the advice and consent of the Senate, of a *Civil Service Commission* consisting of three persons, not more than two of whom shall be adherents of the same political party, under whose recommendation as representatives of the President, selections shall be made for the lower grades of the federal service upon the basis of competitive examination. It forbids the solicitation of money from employees of the government for political uses and all active party service on the part of members of the civil administration: it endeavors, in short, to "take the civil service out of politics."

1105. The carrying out of those portions of the Act which relate to the method of choosing public officers is, however, entirely subject to

the pleasure of the President. The Constitution vests in him the power of appointment, subject to no limitation except the possible advice and consent of the Senate. Any Act which assumes to prescribe the manner in which the President shall make his choice of public servants must, therefore, be merely advisory: the President may accept its directions or not as he pleases. The only force that can hold him to the observance of its principle is the force of public opinion.

1106. **The Presidential Succession.** — In case of the removal, death, resignation, or disability of both the President and Vice-President, the office of President is to be filled *ad interim* by the Secretary of State, or, if he cannot act, by the Secretary of the Treasury, or, in case he cannot act, by the Secretary of War; and so on, in succession, by the Attorney General, the Postmaster General, the Secretary of the Navy, or the Secretary of the Interior. None of these officers can act, however, unless he have the qualifications as to age, citizenship, and residence required by the Constitution of occupants of the presidential chair.

Until this arrangement was made, by act of Congress in 1886, the 'succession' passed first to the president *pro tempore* of the Senate, and, failing him, to the Speaker of the House of Representatives. This was found inconvenient because there are intervals now and again when there is neither a president *pro tempore* of the Senate nor a Speaker of the House.

1107. **Relations of the Executive to Congress.** — The only provisions contained in the Constitution concerning the relation of the President to Congress are these: that "he shall, from time to time, give to the congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient"; and that "he may, on extraordinary occasions, convene both houses, or either of them," in extra session, "and, in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper" (Art. II., sec. iii.). His power to inform Congress concerning the state of the union and to recommend to it the passage of measures is exercised only in the sending of annual and special written 'messages.'

1108. Washington and John Adams interpreted the clause to mean that they might address Congress in person, as the sovereign in Eng-

land may do: their annual communications to Congress were spoken addresses. But Jefferson, the third President, being an ineffective speaker, this habit was discontinued and the fashion of written messages was inaugurated and firmly established. (Compare sec. 679.) Possibly, had the President not so closed the matter against new adjustments, this clause of the Constitution might legitimately have been made the foundation for a much more habitual and informal, and yet at the same time much more public and responsible, interchange of opinion between the Executive and Congress. Having been interpreted, however, to exclude the President from any but the most formal and ineffectual utterance of perfunctory advice, our federal executive and legislature have been shut off from co-operation and mutual confidence to an extent to which no other modern system furnishes a parallel. In all other modern governments the heads of the administrative departments are given the right to sit in the legislative body and to take part in its proceedings. The legislature and executive are thus associated in such a way that the ministers of state can lead the houses without dictating to them, and the ministers themselves be controlled without being misunderstood, — in such a way that the two parts of the government which should be most closely co-ordinated, the part, namely, by which the laws are made and the part by which the laws are executed, may be kept in close harmony and intimate co-operation, with the result of giving coherence to the action of the one and energy to the action of the other.

1109. **The Executive Departments.** — The Constitution does not provide for the creation of executive departments, but it takes it for granted that such departments will be founded. Thus it says (Art. II., sec. ii., par. 1, 2) that the President "may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices," and that Congress may vest the appointment of such inferior officers as it may see fit "in the heads of departments." The executive departments consequently owe their creation and organization to statute only.

1110. The first Congress erected four such departments, namely, the departments of State, of the Treasury, of War, and of Justice. In 1798 the management of the navy, which had at first been included in the duties of the War Department,

was entrusted to a special Department of the Navy; in 1829 the post office, which had been a subdivision of the Treasury, was created an independent Department; and in 1849 a Department of the Interior was organized to receive a miscellany of functions not easy to classify, except in the feature of not belonging properly within any department previously created.

A similar character, it is interesting to remark, may be attributed to some corresponding department, bearing either this name or a name of like significance, in almost every other modern government. There is everywhere a department of state to receive functions not otherwise specially disposed of.

1111. In 1889 there was added to these a Department of Agriculture. We have, thus, at present, eight executive departments, viz.: (1) **A Department of State,** which is what would be called in most other governments our "foreign office," having charge of all the relations of the United States with foreign countries.

1112. (2) **A Department of the Treasury,** which is the financial agency of the government, and whose functions cover the collection of the public revenues accruing through the customs duties and the taxes on whiskey and tobacco, their safe keeping and their disbursement in accordance with the appropriations from time to time made by Congress; the auditing of the accounts of all departments; the supervision and regulation of the national banks and of the currency of the United States; the coinage of money; and the collection of certain industrial and other statistics.

This Department, therefore, contains within it the treasury and comptrolling functions which in the states are separated.

1113. To this Department is attached also the *Bureau of Printing and Engraving*, by which all the printing of the paper currency, bonds, and revenue stamps of the government is done.

1114. (3) **A Department of War,** which has charge of the military forces of the Union;

1115. (4) **A Department of the Navy,** which has charge of the naval forces of the general government;

1116. (5). **A Department of Justice,** from which emanates all the legal advice of which the federal authorities stand in need at any time, and to which is entrusted the supervision of the conduct of all litigation in which the United States may be concerned. To it are subordinate all the marshals and district attorneys of the United States, — all ministerial, non-judicial law officers, that is, in the service of the government. It may be compendiously described as the lawyer force of the government. It is presided over by an Attorney General, all the other departments, except the Post Office, being under 'Secretaries.'

1117. (6) **A Post Office Department,** under a Postmaster General, which is charged with the carrying and delivery of letters and parcels, with the transmission of money by means of certain 'money orders' and notes issued by the Department, or under cover of a careful system of registration, and with making the proper postal arrangements with foreign countries.

These arrangements with foreign countries may be made without the full formalities of treaty, the consent of the President alone being necessary for the ratification of international agreements made by the Postmaster General for the facilitation of the functions of the Department. The United States is a member of the Universal Postal Union, to which most of the civilized countries of the world belong. The central office of this Union is under the management of the Swiss administration. Its administrative expenses are defrayed by contribution of the various governments belonging to the Union.

1118. (7) **A Department of the Interior,** which has charge (i.) Of the taking of the Census, as from time to time ordered by Congress in accordance with the provision of the Constitution (Art. I., sec. i., par. 3) which makes it the duty of Congress to have a census taken every ten years as a basis for the redistribution of representation in the House of Representatives among the several states; (ii.) Of the management of

the public lands (*General Land Office*); (iii.) Of the government's dealings with the Indians, a function which is exercised through a special Commissioner of Indian Affairs in Washington and various agencies established in different parts of the Indian country.

It is through this *Indian Bureau*, for example, that all laws concerning the settlement, assistance, or supervision of the tribes are administered, as well as all laws concerning the payment of claims made upon the federal government for compensation for depredations committed by the Indians, and laws touching the distribution and tenure of land among the Indians.

(iv.) Of the paying of pensions and the distribution of bounty lands, a function which it exercises through a special *Commissioner of Pensions;* (v.) Of the issuing and recording of patents and the preservation of the models of all machines patented: for the performance of these duties there is a *Patent Office;* (vi.) Of the keeping and distribution of all public documents (*Superintendent of Public Documents*); (vii.) Of the auditing of the accounts of certain railway companies, to which the United States government has granted loans or subsidies, and the enforcing of the laws passed by Congress with reference to such roads (*Office of the Commissioner of Railroads*); (viii.) Of the collection of statistical and other information concerning education, and the diffusion of the information so collected for the purpose of aiding the advance and systematization of education throughout the country (*The Office of Education*); (ix.) Of the superintendence of the government hospital for the insane and the Columbia Asylum for the Deaf and Dumb.

Many of these subdivisions of the Interior, though in strictness subject to the oversight and control of the Secretary of the Interior, have in reality a very considerable play of independent movement.

1119. (8) **A Department of Agriculture,** which is charged with furthering in every possible way, by the collection of information not only, but also by the prosecution of scientific

investigation with reference to the diseases of plants, etc., the agricultural interests of the country, and under which there is maintained a special *Forestry Division*.

1120. Set apart to themselves, and therefore without representation in the Cabinet, there are (1) The *Department of Labor*, which is charged with the collection and publication of statistical and other information touching the condition and interests of laborers, — information, for instance, bearing upon the relations of labor and capital, hours of labor, the housing of laborers, rates of wages and methods of payment, the food and expenses of laborers, etc. (2) The *Interstate Commerce Commission*, a semi-judicial body by which the federal statutes forbidding unjust discriminations in railway rates in interstate freight or passenger traffic, prohibiting certain sorts of combinations in railroad management, etc., are interpreted and enforced. (3) The *Civil Service Commission* by which the Act mentioned in sec. 1104 is administered. (4) The *Commission of Fish and Fisheries*, whose duty it is to make the necessary investigations and prosecute the necessary measures for the preservation, improvement, and increase of the stock of fish in our rivers and lakes and on our coasts.

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XII.

SUMMARY: CONSTITUTIONAL AND ADMINISTRATIVE DEVELOPMENTS.

1121. **Continuity of Development.** — From the dim morning hours of history when the father was king and priest down to this modern time of history's high noon when nations stand forth full-grown and self-governed, the law of coherence and continuity in political development has suffered no serious breach. Human choice has in all stages of the great world-processes of politics had its part in the shaping of institutions; but it has never been within its power to proceed by leaps and bounds: it has been confined to adaptation, altogether shut out from raw invention. Institutions, like morals, like all other forms of life and conduct, have had to wait upon the slow, the almost imperceptible formation of habit. The most absolute monarchs have had to learn the moods, observe the traditions, and respect the prejudices of their subjects; the most ardent reformers have had to learn that to outrun the sluggish masses was to render themselves powerless. Revolution has always been followed by reaction, by a return to even less than the normal speed of political movement. Political growth refuses to be forced; and institutions have grown with the slow growth of social relationships; have changed in response, not to new theories, but to new circumstances. The evolutions of politics have been scarcely less orderly and coherent than those of the physical world.

1122. **The order discoverable in institutional development** is not of course the order of perfect uniformity: institutions, like the races which have developed them, have varied infinitely according to their environment. Climate, war, geographical situation have shaped them: the infinite play of human thought, the infinite many-sidedness of human character have been reflected in them. But the great stages of development have remained throughout clear and almost free from considerable irregularities. Tested by history's long measurements, the lines of advance are seen to be singularly straight.

1123. **Course of Development in the Ancient World.** — If the bond of kinship was at first clear and unmistakable, it must ere long have become much less defined in the broadened Family. When the Family became merged in the still wider Community, solidarity remained and a strong *sense* of kinship, but the reality of kinship had no doubt largely departed, and law had begun to take on a public character, to bear the sanction of all rather than the sanction of a single supreme person. Kinship was typified still in the hereditary character of the kingship; but the king was now the representative of the community rather than its master. The Community developed into the city-state: and further than this the ancient peoples did not go. In Rome and in the great city-states of Greece the conception of *citizenship* supplants the idea of kinship: the State becomes virtually personified in the thought of the time: it is the centre of civic affection and the object of all civic virtue: the public officer rules not in his own name but in the name of the State. Around Rome at last there grows up a vast Empire; but it is *Rome's* Empire, — the world has fallen into the hands of a city, and the only citizenship that Caracalla can bestow is the citizenship of Rome. This city-statehood is the last word of the ancient world in politics.

1124. **The Feudal System and the Modern Monarch.** — When the Germans emerge we have the State in a new aspect. Nations are moving in arms, and the Host is now the State.

Commanders of Hosts are the kings of the new order of things. The Host settles on the lands of the old Roman dominions, and that military tenure is developed which we have learned to call the Feudal System. This Feudal System, when it has worked its perfect work, in such countries as France and Germany, brings forth still a third type of kingship: we presently have the king who *owns* his kingdom as supreme feudal lord: the king who, having absorbed fief after fief, at last possesses his kingdom by a perfected legal title, whose realm is his estate. This is the king who becomes the sole source of law and of justice, the king who, in our day, grants out of his abundant grace rights and constitutions to his people.

1125. **England's Contribution.** — Where the Feudal System fails of its full fruitage, as in England, where freehold estates are not blotted out, where tenure of the king as overlord is a theory but never a reality, and where local self-government obtained a lasting rootage in the national habit, political development takes another course. There political liberty abides continually, in one form or another, with the people, and it is their operative power which gives to liberty expansion, and which finally creates the constitutional state, the limited monarchy, the free self-governing nation. Out of the fief grew the kingdom; out of the freehold and local self-government grew the constitutional state; out of the constitutional state grew that greatest of political developments, the free, organic, self-conscious, self-directing nation, with its great organs of popular representation and its constitutional guarantees of liberty.

1126. **The Romans and the English.** — In this history of development two nations stand forth pre-eminent for their political capacity: the Roman nation, which welded the whole ancient world together under one great organic system of government, and which has given to the modern world the groundwork of its systems of law; and the English nation, which gave birth to America, which has "dotted over the whole surface of the globe with her possessions and military posts," and

from which all the great nations of our time have borrowed much of their political thought and more of their political practice. And what is most noteworthy is this, that these two nations closely resemble each other, not only in the mental peculiarities which constitute the chief element of their political strength, but also in the institutional foundations which they have successively laid for their political achievements.

1127. **Likenesses between the Two Imperial Nations.** — Both have been much stronger in creating and working institutions than in explaining them: both of them have framed such a philosophy as they chose to entertain 'after the fact': neither has been too curious in examining the causes of its success or in working out logical sequences of practice. Above all, neither has suffered any taint of thoroughness to attach itself to its political methods. Slowly, and without much concern for theories of government, each has made compromise its method, adaptation its standing procedure. Illogical, unimaginative their mode of procedure must be said to have been throughout, a mode for slow, practical men, without speed or boldness. Revolution has never fallen within their calculations; even change they have seldom consciously undertaken. If old institutions must perish, they must perish within the Roman or English system by decay, by disuse, not by deliberate destruction: if new institutions must be constructed, they must be grafted on the old in such wise that they may at least seem to be parts of the same stock, and may partake as largely as may be of that one vitalizing sap, old custom. As the Roman Senate, from being the chief motive power of the state, came at last to exercise only such prerogatives as the people and the people's officers suffered it to retain, so the English House of Lords, from being the single coadjutor of the king in legislation, has been reduced to a subordinate part which it plays only upon sufferance, and all without any sudden or premeditated step of revolution. As the consular

power in Rome was slowly pared down to be dealt out in parts to plebeian officials, so has the royal power in England been piece by piece transferred to the hands of ministers, the people's representatives. The whole political method of the two peoples is the same: the method of change so gradual, so tempered with compromise and discretion, so retarded and moderated by persistent habit that only under the most extraordinary pressure is it ever hastened into actual revolution.

1128. **Popular Initiative in Rome and England.** — Doubtless much of this likeness of temperament and method is due to the fact that both in Rome and in England it has been the nation, and not merely a small governing class, which has been behind political change. The motive power was popular initiative: the process of change was the labored process of legislation, the piece-meal construction which is to be compounded out of the general thought. Measures have had in both cases to be prepared for the general acceptance; and popular action, wherever it is the wont for the people to act, is always conservative action. A king's law-making is apt to be rapid, thorough, consistent; but a nation's law-making, devised and struggled for piece by piece, cannot be. The plebeians in Rome, fighting inch by inch towards the privileges which they coveted, the people in England making their way by long-protracted efforts towards the control they desired to exercise, have had to advance with painful slowness, and to be content with one piece at a time of the power they strove for.

1129. **Rome's Change of System under the Empire.** — With the full establishment of imperial forms of government Rome lost the conservative habit of her republican period. The methods of the first emperor, indeed, were slow and cautious in the highest degree: Augustus avoided all show or name of imperial power: carefully regardful of republican sentiment and spirit, which he knew to be not yet extinct, he simply accumulated to himself one by one every republican office, professing the while merely to exercise for somewhat

extended periods, — periods which steadily lengthened from terms of years to tenure for life, — but by free gift of the Senate and people, the old offices of self-government. But later emperors were by no means so careful or so considerate of popular prejudices: their power was open, bold, oftentimes even wanton. And with these changes in the nature of the government came of course radical changes in political method: there came the wilful creation of new offices known to no Roman custom, the constant breach of old practices hallowed by immemorial Roman habit, — the whole familiar process, in brief, of arbitrary power. What Rome gained thus in discipline, in military efficiency, she lost of course in political capacity. For that capacity so characteristic of the Romans and the English, the capacity namely for political organization, is beyond question inseparably connected with popular initiative, with national self-direction, with self-government.[1]

1130. **Fundamental Contrast between English and Roman Political Method.** — The most striking contrast between the English and the Romans consists in a vital and far-reaching difference in political organization. What I have said touching the national action of the two peoples, the slow, conservative concert of the people as a whole in the origination and effectuation of policy (secs. 1127–8) must be understood in different senses in the two cases. It was true of the Romans only during the period of the Republic, and while the Roman people could take a direct part in affairs. The Teuton brought into force, particularly in England, the principle of *representation*, that organization by representative assemblies which enabled the people to act over wide areas through trusted men elected to speak and act in their stead, and which thus enabled the organization of the nation to extend without loss of vitality. Of such methods the Roman knew nothing. Only

[1] The student ought of course to test in detail this likeness between Rome and England. I can here only indicate in the most rapid way the line of study.



the people of the city of Rome backed and gave form to Roman legislation, for the Roman had conceived of no system of action by a delegation of the law-making power. The equal and concerted action of widely diffused populations through the instrumentality of representation was utterly unknown to the ancient world. The county court with its reeve and four selected men from each township, the parliament with its knights from the shire and its burgesses from the towns, instrumentalities so familiar everywhere now that the world has gone to school to the English in politics, were for a long time peculiar to England in their best features. They were the peculiar fruit of Teutonic political organization where that organization had grown most apart from the Roman influence, in England, not on the Continent, penetrated as the continental lands were everywhere by the Roman example. Rome had had no similar means of holding her vast populations together in active political co-operation and living union. Therefore, as her conquests spread, her system became more and more centralized and autocratic. The English could hold populations together, however large they might be, by means of representative assemblies; but the Roman, who knew no method of admitting scattered peoples to a part in the central government, who knew no popular assemblies except those in which all citizens should be actually present and vote, could hold an extended empire together only by military force and the stern discipline of subordination.

This has much to do with the next topic.

1131. **The Development of Legislatures.** — Perhaps the most distinguishing feature of modern as compared with ancient politics is the difference between the sphere, the mode, and the instrumentalities of legislation now, and the character and methods of legislation among the classical nations. Representative law-making bodies are among the commonplace institutions of the political world as we know it: but no such assembly, as I have already said, was ever dreamed of by any

ancient politician. The ancient world was absolutely without representative assemblies, and knew nothing of the principle of representation. Every citizen either took direct part in legislation or took no part in it at all: if he could attend the assembly he could use his vote; if he could not, his vote was simply of no use to him. There was no thought of the possibility of his acting by proxy. Aristotle believed, consequently, that no free state could exist with a wide territory or a population so scattered as to be unable to attend the assemblies. The Roman citizen outside of Rome, away from her assemblies, had privileges but had no operative powers.

What the Greeks and Romans did not know at all the Teuton seems to have known almost from the first: representation is one of the most matter-of-course devices of his native polity, and from him the modern world has received it.

1132. Our early colonial history furnishes at least two very curious examples of a transition from primary to representative assemblies. The earliest legislature of Maryland was a primary assembly composed of all the freemen of the colony; to the next assembly some were allowed to send proxies; and before representation was finally established there appeared the singular anomaly of a body partly representative, partly primary, at least one freeman insisting upon attending in person (Doyle, I., pp. 287–290). The other example is to be found in the history of Rhode Island, whose citizens for some time insisted upon meeting at Newport in primary assembly for the purpose of electing the persons who were to represent them in the colonial legislature, thus as it were jointly inaugurating the session, to use Mr. Foster's words, and then leaving the legislature "to run for itself for the remainder of the time" (W. E. Foster, *Town Government in Rhode Island*, p. 26).

1133. **The Powers of a Representative.** — But only very modern times have settled the theory of a representative's power. The strong tendency among all vigorously political, all self-reliant self-governing peoples has been to reduce their representatives to the position and functions of mere delegates, bound to act, not under the sole direction of their own judg*ments*, but upon instruction from their constituents. The



better thought of later times has, however, declared for a far different view of the representative's office, has claimed for the representative the privilege of following his own judgment upon public questions, of acting, not as the mouthpiece but rather as the fully empowered substitute of his constituents.

1134. **Scope of Modern Legislation.** — The question is of the greater importance because of the extraordinary scope of legislation in the modern state, and of the extreme complexity nowadays attaching to all legislative questions. Time was, in the infancy of national representative bodies, when the representatives of the people were called upon simply to give or refuse their assent to laws prepared by a king or by a privileged class in the state; but that time is far passed. The modern representative has to judge of the gravest affairs of government, and has to judge as an originator of policies. It is his duty to adjust every weighty plan, preside over every important reform, provide for every passing need of the state. All the motive power of government rests with him. His task, therefore, is as complex as the task of governing, and the task of governing is as complex as is the play of economic and social forces over which it has to preside. Law-making now moves with a freedom, now sweeps through a field unknown to any ancient legislator; it no longer provides for the simple needs of small city-states, but for the necessities of vast nations, numbering their tens of millions. If the representative be a mere delegate, local interests must clash and contend in legislation to the destruction of all unity and consistency in policy; if, however, the representative be not a mere delegate, but a fully empowered member of the central government, coherence, consistency, and power may be given to all national movements of self-direction.

1135. **The Making, Execution, and Interpretation of Law.** — The question of the place, character, and functions of legislation is in our days a very different question from any that faced the ancient politician. The separation of legislative,

judicial, and executive functions is a quite modern development in politics, and we have questions to settle concerning the integration of these three functions which could not have arisen in any ancient state. In the early days when the family was the state; in the later days when the political organization, although it had lost the father's omnipotent jurisdiction, still rested upon the idea of kinship; and even in still later times when forms of government inherited from these primitive conceptions still persisted, all the functions of government were vested in a single individual or in a single body of individuals, in a father-king or in an assembly of elders. Even in highly developed free states like Athens no adequate or complete recognition of any essential difference in the character of the several duties of the judge, the executive officer, and the law-maker is discoverable. It was a very modern conception that governmental functions ought to be parcelled out according to a careful classification. The ancient assembly made laws, elected officers, passed judgment upon offenders against the laws, and yet was conscious of no incongruity. It was before the day when anyone could be shocked by such a confusion of powers.

1136. Modern politicians are, however, greatly shocked by such confusions of function. They insist, as of course, that every constitution shall separate the three 'departments' of government, and that these departments shall be in some real sense independent of each other; so that if one go wrong the others may check it by refusing to co-operate with it. In no enlightened modern system may the legislator force the judge, or the judge interfere with the privileges of the legislator, or judge or legislator wrongly control the executive officer.

1137. **Charters and Constitutions.** — This division of powers between distinct branches of government has been greatly emphasized and developed by the written constitutions so characteristic of modern political practice. These constitutions have by no means all had the same history, and they differ as widely in

character as in origin; but in every case they give sharp definiteness to the organs and methods of government which illustrate the most salient points of modern political development. Our own constitutions, as we have seen (sec. 860), originated in grants from the English crown, for which were substituted, in the days following the war for Independence, grants by the people. Originally royal, they are now national charters: and they have been kept close to the people, firmly based upon their direct and explicit sanction. The constitutions of Switzerland bear a like character: proceeding from the people, they rest in all points upon the people's continuing free choice.

1138. In France, on the contrary, the people have as yet had no direct part in constitution-making. French constitutions have in all cases been both made and adopted by constituent assemblies: at no stage are the people called upon for their opinion, — not even after the constitution has been formulated: its adoption, like its construction, is a matter for the constituent assembly alone: it is given to the people, not accepted by them. The present constitution of the Republic was even framed and adopted by a convention which could show no claim to have been elected as a constituent assembly (sec. 311).

1139. **Creation vs. Confirmation of Liberties by Constitution.** — This process, of the gift of a constitution to the people by an assembly of their own choice, may be said to be intermediate between our own or the Swiss practice, on the one hand, and the practice of the monarchical states of Europe, on the other, whose constitutions are the gift of monarchs to their people. In many cases they have been forced from reluctant monarchs, as Magna Charta was wrung by the barons from John: but whether created by stress of revolution, as in so many states in 1848 (sec. 396), or framed later and at leisure, as in Prussia (sec. 396), they have been in the form of royal gifts of right, have not confirmed but *created* liberties and privileges.

1140. Our own charters and constitutions have, on the con-

trary, been little more than formal statements of rights and immunities which had come to belong to Englishmen quite independently of royal gift or favor. The Acts of Parliament upon which the governments of such modern English colonies as Canada and Australia rest do scarcely more, aside from their outlining of forms of government, than extend to the colonists the immemorial privileges of Englishmen in England. And so our own colonial charters, besides providing for governors, courts, and legislatures, simply granted the usual rights of English freeman. Our constitutions have formulated our political progress, but the progress came first. European constitutions, on the other hand, have for the most part created the rights and immunities, as well as the popular institutions, which they embody: they institute reform, instead of merely confirming and crystallizing it.

1141. **The Modern Federal State: Contrasted with Confederations.** — In no part of modern political development have written constitutions played a more important, a more indispensable rôle than in the definite expression of the nice balance of institutions and functions upon which the carefully adjusted organism of the modern federal state depends. The federal state, as we know it, is a creation of modern politics. Ancient times afford many instances of confederated states, but none of a federal state. The mere confederations of ancient and of modern times, however long preserved, and of however distinguished history, were still not states in the proper sense of the term.

The most prominent example of a confederation in ancient times was the celebrated Achæan League. In modern times we have had the early Swiss confederation, the several German confederacies, and our own short-lived Confederation.

They were composed of states, and their only constituent law was treaty: they were themselves, as confederacies, without sovereign power: sovereignty remained unimpaired with their component states. Their members did not unite: they

simply agreed to act in concert touching certain matters of common interest.

1142. The modern federal state, on the contrary, is a single and complete political personality among nations: it is not a mere relationship existing between separate states, but is itself a State. To use two expressive German terms, a confederation is a *Staatenbund* merely, while a federal state is a *Bundesstaat.* Confederation and federal state have this peculiarity in common, they are both constituted by the association of distinct, independent communities; but under a confederation these communities practically remain distinct and independent, while within a federal state they are practically welded together into a single state, into one nation.

1143. Under both forms, however, it has proved possible to make provision for the association upon the best terms of mutual help and support of communities unlike in almost every feature of local life, and even of communities diverse in race, without any surrender of their individuality or of their freedom to develop each its characteristic life. Nothing could well be conceived more flexible than a system which can hold together German, French, and Italian elements as the Swiss constitution does.

1144. **Distinguishing Marks of the Federal State.** — The federal state has, as contrasted with a confederation, these distinguishing features: (*a*) a permanent surrender on the part of the constituent communities of their right to act independently of each other in matters which touch the common interest, and the consequent fusion of these communities into what is practically a single state. As regards other states they have merged their individuality into one national whole: the lines which separate them are none of them on the outside but all on the inside of the new organism. (*b*) The federal state possesses a special body of federal law, a special federal jurisprudence in which is expressed the national authority of the compound state. This is not a law agreed to by the constituent communities: as regards the federal law there are no constituent

communities: it is the spoken will of the new community, the Union. (*c*) There results a new conception of sovereignty. There exists in the federal state no completely sovereign body, and the functions of sovereignty are parcelled out among authorities national and local. In certain spheres of state action the authorities of the Union are entitled to speak the common will, to utter laws which are the supreme law of the land; in other spheres of state action the constituent communities still act with the full autonomy of completely independent states. The one set of authorities is no more sovereign than the other: the attributes of sovereignty are, so to say, 'in commission.'

1145. All modern federal states have written constitutions; but a written constitution is not, of course, an essential characteristic of federalism, it is only a feature of high convenience; such delicate co-ordinate rights and functions as are characteristic of federalism must be carefully defined: each set of authorities must have its definite commission.

1146. It is not certain that the federal state, as thus described, is not a merely temporary phenomenon of politics. It is plain from the history of modern federal states, — a history as yet extremely brief, — that the strong tendency of such organization is towards the transmutation of the federal into a unitary state. After union is once firmly established, not in the interest only but also in the affections of the people, the drift would seem to be in all cases towards consolidation.

1147. **Existing Parallels and Contrasts in Organization.** — The differences which emerge most prominently upon a comparison of modern systems of government are differences of administrative organization chiefly and differences in the relationship borne by Executives to Legislatures.

1148. **Administrative Integration: Relation of Ministers to the Head of the Executive.** — One of the chief points of interest and importance touching any system of administration is the relations which the ministers of state bear to the head of the Executive. Of course much of the consistency and success of policy depends upon the presence or absence of a

single guiding will: if ministers be without real leadership, they are probably without energy or success in policy, if not positively at odds with each other.

1149. Under our own system the heads of departments are of course brought together into at least nominal unity by their common subordination to the President. Although they are, as we have seen (sec. 1097), rather the colleagues than the servants of the President, his authority is yet always in the last resort final and decisive: the secretaries have had very few powers conferred upon them by Congress in the exercise of which they are not more or less subject to presidential oversight and control. The President is in a very real sense head of the Executive. In France and England, on the contrary, the nominal head of the Executive is not its real head. Not the President or the sovereign but the Prime Minister speaks the decisive word in administration and in the initiation of policy, — and the Prime Minister only so far as he can carry his colleagues with him. The headship of the President and the sovereign is in large part formal merely, being real only in proportion to the influence given them by their interior position as regards affairs. The influence of the Prime Minister is the vital integrating force. Perhaps it is safe to say that only in Germany, among constitutional states, have we an example of a supreme guiding will in administration. The Emperor's own will or that of the vice-regent Chancellor is the real centre and source of all policy: the heads of department are ministers of that will. And there is of course under such a system an energy and coherence of administrative action such as no other system can secure. The grave objection to it is the absorption of so much vitality by the head of the state that its outlying parts, its great constituent members, the people, are drained of their political life.

1150. **Relations of the Administration as a Whole to the Ministers as a Body.** — Scarcely less important from an administrative point of view than the relations of the ministers

to the head of the Executive is the relation of the administration as a whole, both central and local, to the ministers as a body. We have seen (secs. 974, 993) that in the commonwealths of our own Union there is in this regard practically no administrative integration, that the central officers of administration do not as a rule constitute a controlling but only a superior sort of clerical body. In our federal organization we have the President as supreme chief, but the cabinet as a body does not usually exercise any concerted control over administration taken as a whole. Its counsellings are confined for the most part to political questions: administrative questions are decided separately, by each department for itself, the only real central authority in administrative matters being the President's opinion, not the counsel of his ministers. As regards points of administrative policy each department is a law unto itself. In England we find a slightly greater degree of administrative control exercised by the Cabinet as a body. A "Treasury minute," for instance, is required for any redivision of business among the departments, and such redivisions are presumably matters of agreement in Cabinet council. But even in England the administrative control of the Cabinet is rather the result of the political responsibility of the Cabinet than of any conscious effort to integrate administration by the constitution of a body which shall habitually regulate, by semi-judicial processes, the main features and often even the details of executive management. In France and Prussia, on the contrary, such an effort is made, and is made with effect. In France, besides a Cabinet of ministers whose function is wholly political, there is a *Council* of ministers whose single office is systematic administrative oversight, the harmonizing of methods, the proper distribution of business among the departments, etc. (sec. 325); and above this Council of ministers, again, there is a Council of State, a judicial body whose part it is to accommodate all disputes and adjust all conflicts of jurisdiction between the departments, as well as to act as the supreme



administrative tribunal (sec. 353). In Prussia there is a like system : a *Staatsministerium* which to a certain extent combines the duties given in France to the Council of Ministers and to the Council of State, and also a Council of State which is by degrees being elevated to high judicial functions (sec. 460).

1151. **The Administration and the Legislature.** — The relations borne by the Administration, the branch which executes the laws, to the Legislature, the branch which makes the laws, of course touch the essence of a system of government. Legislation and administration ought under every well-devised system to go hand in hand. Laws must receive test of their wisdom and feasibility at the hands of administration: administration must take its energy and its policy from legislation. Without legislation administration must limp, and without administration legislation must fail of effect. The vital connection between the two is well illustrated in the matter of money appropriations for the support of administration. Legislators hold, and properly hold, the purse-strings of the nation: only with their consent can taxes be raised or expended. Without the appropriations for which they ask, administrators cannot efficiently perform the tasks imposed upon them : but without full explanation of the necessity for granting the sums asked and of the modes in which it is proposed to spend them legislators cannot in good conscience vote them. A perfect understanding between Executive and Legislature is, therefore, indispensable, and no such understanding can exist in the absence of relations of full confidence and intimacy between the two branches.

1152. The absence of such a co-operative understanding has led in France to the gravest financial impotency on the part of the government. The Chambers trust almost nothing concerning appropriations to the authoritative suggestion of the ministers. The great Budget Committee (sec. 332) not only examines and revises but also at pleasure annuls or utterly reverses the financial proposals of the ministers: the ministers are for the most part left entirely without power, and there-

fore entirely without responsibility, in the matter, and appropriations follow the whim of the Chambers rather than the necessities of administration. In England the ministers are allowed to insist upon the appropriation of the sums they ask for, because they are held strictly responsible to Parliament for the policy involved in every financial proposal: the means of raising the money desired Parliament is to a certain extent at liberty to suggest without implying distrust of the ministers; but the amounts the ministers ask for must be voted unless Parliament wishes the ministers to resign. Confidence and responsibility go hand in hand (secs. 686, 689). Under our own system there is practically no commerce between the heads of departments and Congress: the administration sends in estimates, but the Appropriations Committees of the houses decide without ministerial interference the amounts to be granted.

1153. Of course the relations existing between the Executive and the Legislature equally affect every other question of policy, from mere administrative questions, such as the erection of new departments, increases of clerical force, or the redistribution of departmental business, to the gravest questions of commerce, diplomacy, and war. The integration or separation of the Executive and the Legislature may be made an interesting and important criterion of the grade and character, in this day of representative institutions, of political organization in the case of existing governments. Thus in England we have complete leadership in legislation entrusted to the ministers, and to complete leadership is added complete responsibility (secs. 686, 689). In France we have partial leadership (financial matters being excluded) with entire responsibility (sec. 327). In Prussia, leadership without responsibility (sec. 422); and in Switzerland the same (sec. 533). Under our own system we have isolation *plus* irresponsibility, — isolation and *therefore* irresponsibility. At this point more widely than at any other our government differs from the other governments of the world. Other Executives lead; ours obeys.

XIII.

NATURE AND FORMS OF GOVERNMENT.

1154. **Government Rests upon Authority and Force.** — The essential characteristic of all government, whatever its form, is authority. There must in every instance be, on the one hand, governors, and, on the other, those who are governed. And the authority of governors, directly or indirectly, rests in all cases ultimately on *force*. Government, in its last analysis, is organized force. Not necessarily or invariably organized armed force, but the will of one man, of many men, or of a community prepared by organization to realize its own purposes with reference to the common affairs of the community. Organized, that is, to rule, to dominate. The machinery of government necessary to such an organization consists of instrumentalities fitted to enforce in the conduct of the common affairs of a community the will of the sovereign man, the sovereign minority, or the sovereign majority.

1155. **Not necessarily upon Obvious Force.** — This analysis of government, as consisting of authority resting on force, is not, however, to be interpreted too literally, too narrowly. The force behind authority must not be looked for as if it were always to be seen or were always being exercised. That there is authority lodged with ruler or magistrate is in every case evident enough; but that that authority rests upon force is not always a fact upon the surface, and is therefore in one sense not always practically significant. In the case of any particular government, the force upon which the authority of its officers

rests may never once, for generations together, take the shape of armed force. Happily there are in our own day many governments, and those among the most prominent, which seldom coerce their subjects, seeming in their tranquil noiseless operations to run themselves. They in a sense operate without the exercise of force. But there is force behind them none the less because it never shows itself. The strongest birds flap their wings the least. There are just as powerful engines in the screw-propeller, for all she glides so noiselessly, as in the side-wheeler that churns and splashes her way through the water. The better governments of our day — those which rest, not upon the armed strength of governors, but upon the free consent of the governed — are without open demonstration of force in their operations. They are founded upon constitutions and laws whose source and sanction are the will of the majority. The force which they embody is not the force of a dominant dynasty nor of a prevalent minority, but the force of an agreeing majority. And the overwhelming nature of this force is evident in the fact that the minority very seldom challenge its exercise. It is latent just because it is understood to be omnipotent. There is force behind the authority of the elected magistrate, no less than behind that of the usurping despot, a much greater force behind the President of the United States, than behind the Czar of Russia. The difference lies in the *display* of coercive power. Physical force is the prop of both, though in the one it is the last, while in the other it is the first resort.

1156. **The Governing Force in Ancient and in Modern Society.** — These elements of authority and force in government are thus quite plain to be seen in modern society, even when the constitution of that society is democratic; but they are not so easily discoverable upon a first view in primitive society. It is common nowadays when referring to the affairs of the most progressive nations to speak of 'government by public opinion,' 'government by the popular voice'; and such



phrases possibly describe sufficiently well all full-grown democratic systems. But no one intends such expressions to conceal the fact that the majority, which utters 'public opinion,' does not prevail because the minority are convinced, but because they are outnumbered and have against them not the 'popular voice' only, but the 'popular power' as well — that it is the potential might rather than the wisdom of the majority which gives it its right to rule. When once majorities have learned to have opinions and to organize themselves for enforcing them, they rule by virtue of power no less than do despots with standing armies or concerting minorities dominating unorganized majorities. But, though it was clearly opinion which ruled in primitive societies, this conception of the might of majorities hardly seems to fit our ideas of primitive systems of government. What shall we say of them in connection with our present analysis of government? They were neither democracies in which the will of majorities chose the ways of government, nor despotisms, in which the will of an individual controlled, nor oligarchies, in which the purposes of a minority prevailed. Where shall we place the force which lay behind the authority exercised under them? Was the power of the father in the patriarchal family power of arm, mere domineering strength of will? What was the force that sustained the authority of the tribal chieftain or of that chief of chiefs, the king? That authority was not independent of the consent of those over whom it was exercised; and yet it was not formulated by that consent. That consent may be said to have been involuntary, *inbred*. It was born of the habit of the race. It was congenital. It consisted of a custom and tradition, moreover, which bound the chief no less than it bound his subjects. He might no more transgress the unwritten law of the race than might the humblest of his fellow-tribesmen. He was governed scarcely less than they were. All were under bondage to strictly prescribed ways of life. Where then lay the force which sanctioned the authority of chief and sub-chief and

father in this society? Not in the will of the ruler: that was bound by the prescriptions of custom. Not in the popular choice: over that too the law of custom reigned.

1157. **The Force of the Common Will in Ancient Society.** — The real residence of force in such societies as these can be most easily discovered if we look at them under other circumstances. Nations still under the dominion of customary law have within historical times been conquered by alien conquerors; but in no such case did the will of the conqueror have free scope in regulating the affairs of the conquered. Seldom did it have any scope at all. The alien throne was maintained by force of arms, and taxes were mercilessly wrung from the subject populations; but never did the despot venture to change the customs of the conquered land. Its native laws he no more dared to touch than would a prince of the dynasty which he had displaced. He dared not play with the forces latent in the prejudices, the fanaticism of his subjects. He knew that those forces were volcanic, and that no prop of armed men could save his throne from overthrow and destruction should they once break forth. He really had no authority to govern, but only a power to despoil,— for the idea of government is inseparable from the conception of *legal regulation*. If, therefore, in the light of such cases, we conceive the throne of such a society as occupied by some native prince whose authority rested upon the laws of his country, it is plain to see that the real force upon which authority rests under a government so constituted is after all the force of public opinion, in a sense hardly less vividly real than if we spoke of a modern democracy. The law inheres in the common will: and it is that law upon which the authority of the prince is founded. He rules according to the common will: for that will is, that immemorial custom be inviolably observed. The force latent in that common will both backs and limits his authority.

1158. **Public Opinion, Ancient and Modern.** — The fact that the public opinion of such societies made no choice of



laws or constitutions need not confuse for us the analogy between that public opinion and our own. Our own approval of the government under which we live, though doubtless conscious and in a way voluntary, is largely hereditary — is largely an inbred and inculcated approbation. There is a large amount of mere *drift* in it. Conformity to what is established is much the easiest habit in opinion. Our constructive choice even in our own governments, under which there is no divine canon against change, is limited to *modifications*. The generation that saw our federal system established may have imagined themselves out-of-hand creators, originators, of government; but we of this generation have taken what was given us, and are not controlled by laws altogether of our own making. Our constitutional life was made for us long ago. We are like primitive men in the public opinion which preserves, though unlike them in the public opinion which alters our institutions. Their stationary common thought contained the generic forces of government no less than does our own progressive public thought.

1159. **The True Nature of Government.** — What, then, in the last analysis, is the nature of government? If it rests upon authority and force, but upon authority which depends upon the acquiescence of the general will and upon force suppressed, latent, withheld except under extraordinary circumstances, what principle lies behind these phenomena, at the heart of government? The answer is hidden in the nature of Society itself. Society is in no sense artificial; it is as truly natural and organic as the individual man himself. As Aristotle said, man is by nature a social animal; his social function is as normal with him as is his individual function. Since the family was formed, he has not been without politics, without political association. Society, therefore, is compounded of the common habit, an evolution of experience, an interlaced growth of tenacious relationships, a compact, living, organic whole, structural, not mechanical.

1160. **Society an Organism, Government an Organ.** — Government is merely the executive organ of society, the organ through which its habit acts, through which its will becomes operative, through which it adapts itself to its environment and works out for itself a more effective life. There is clear reason, therefore, why the disciplinary action of society upon the individual is exceptional; clear reason also why the power of the despot must recognize certain ultimate limits and bounds; and clear reason why sudden or violent changes of government lead to equally violent and often fatal reaction and revolution. It is only the exceptional individual who is not held fast in his obedience to the common habit of social duty and comity. The despot's power, like the potter's, is limited by the characteristics of the materials in which he works, of the society which he manipulates; and change which roughly breaks with the common thought will lack the sympathy of that thought, will provoke its opposition, and will inevitably be crushed by that opposition. Society, like other organisms, can be changed only by evolution, and revolution is the antipode of evolution. The public order is preserved because order inheres in the character of society.

1161. **The Forms of Government: Their Significance.** — The forms of government do not affect the essence of government: the bayonets of the tyrant, the quick concert and superior force of an organized minority, the latent force of a self-governed majority, — all these depend upon the organic character and development of the community. "The obedience of the subject to the sovereign has its root not in contract but in force, — the force of the sovereign to punish disobedience;"[1] but that force must be backed by the general habit (secs. 1200–1206). The forms of government are, however, in every way most important to be observed, for the very reason that they express the character of government, and indicate its history.

[1] John Morley, *Rousseau*, Vol. II., p. 184.



They exhibit the stages of political development, and make clear the necessary constituents and ordinary purposes of government, historically considered. They illustrate, too, the sanctions upon which it rests.

1162. **Aristotle's Analysis of the Forms of Government.** — It has been common for writers on politics in speaking of the several forms of government to rewrite Aristotle, and it is not easy to depart from the practice. For, although Aristotle's enumeration was not quite exhaustive, and although his descriptions will not quite fit modern types of government, his enumeration still serves as a most excellent frame on which to hang an exposition of the forms of government, and his descriptions at least furnish points of contrast between ancient and modern governments by observing which we can the more clearly understand the latter.

1163. Aristotle considered Monarchy, Aristocracy, and Democracy (Ochlocracy) the three standard forms of government. The first he defined as the rule of One, the second as the rule of the Few, the third as the rule of the Many.[1] Off against these standard and, so to say, *healthful* forms he set their degenerate shapes. Tyranny he conceived to be the degenerate shape of Monarchy, Oligarchy the degenerate shape of Aristocracy, and Anarchy (or mob-rule) the degenerate shape of Democracy. His observation of the political world about him led him to believe that there was in every case a strong, an inevitable tendency for the pure forms to sink into the degenerate.

1164. **The Cycle of Degeneracy and Revolution.** — He outlined a cycle of degeneracies and revolutions through which, as he conceived, every State of long life was apt to pass. His idea was this. The natural first form of government for every state would be the rule of a monarch, of the single strong man with sovereign power given him because of his strength. This monarch would usually hand on his kingdom to his children.

[1] Not of the absolute majority, as we shall see presently when contrasting ancient and modern democracy (secs. 1170, 1173).

They might confidently be expected to forget those pledges and those views of the public good which had bound and guided him. Their sovereignty would sink into tyranny. At length their tyranny would meet its decisive check at some Runnymede. There would be revolt; and the princely leaders of revolt, taking government into their own hands, would set up an Aristocracy. But aristocracies, though often public-spirited and just in their youth, always decline, in their later years, into a dotage of selfish oligarchy. Oligarchy is even more hateful to civil liberty, is even a graver hindrance to healthful civil life than tyranny. A class bent upon subserving only their own interests can devise injustice in greater variety than can a single despot: and their insolence is always quick to goad the many to hot revolution. To this revolution succeeds Democracy. But Democracy too has its old age of degeneracy — an old age in which it loses its early respect for law, its first amiability of mutual concession. It breaks out into license and Anarchy, and none but a Cæsar can bring it back to reason and order. The cycle is completed. The throne is set up again, and a new series of deteriorations and revolutions begins.

1165. **Modern Contrasts to the Aristotelian Forms of Government.** — The confirmations of this view furnished by the history of Europe since the time of Aristotle have been striking and numerous enough to render it still oftentimes convenient as a scheme by which to observe the course of political history even in our own days. But it is still more instructive to contrast the later facts of political development with this ancient exposition of the laws of politics. Observe, then, the differences between modern and ancient types of government, and the likelihood that the historian of the future, if not of the present and the immediate past, will have to record more divergencies from the cycle of Aristotle than correspondences with it.

1166. **The Modern Absolute Monarchy.** — Taking the Russian government of to-day as a type of the vast absolute Mon-



archies which have grown up in Europe since the death of Aristotle, it is evident that the modern monarch, if he be indeed monarch, has a much deeper and wider reach of power than had the ancient monarch. The monarch of our day is a Legislator; the ancient monarch was not. Ancient society may be said hardly to have known what legislation was. Custom was for it the law of public as well as of private life: and custom could not be enacted. At any rate ancient monarchies were not legislative. The despot issued edicts — imperative commands covering particular cases or affecting particular individuals: the Roman emperors were among the first to promulgate 'constitutions,' — general rules of law to be applied universally. The modern despot can do more even than that. He can regulate by his command public affairs not only but private as well — can even upset local custom and bring all his subjects under uniform legislative control. Nor is he in the least bound to observe his own laws. A word — and that his own word — will set them aside: a word will abolish, a word restore, them. He is absolute over his subjects not only — ancient despots were that — but over all laws also — which no ancient despot was.

1167. Of course these statements are meant to be taken with certain important limitations. The modern despot as well as the ancient is bound by the habit of his people. He may change laws, but he may not change life as easily; and the national traditions and national character, the rural and commercial habit of his kingdom, bind him very absolutely. The limitation is not often felt by the monarch, simply because he has himself been bred in the atmosphere of the national life and unconsciously conforms to it (secs. 1200–1206).

1168. **The Modern Monarchy usually 'Limited.'** — But the present government of Russia is abnormal in the Europe of to-day, as abnormal as that of the Turk — a belated example of those crude forms of politics which the rest of Europe has outgrown. Turning to the other monarchies of to-day, it is at once plain that they present the strongest contrast possible to

any absolute monarchy ancient or modern. Almost without exception in Europe, they are 'limited' by the resolutions of a popular parliament. The people have a distinct and often an imperative voice in the conduct of public affairs.

1169. **Is Monarchy now succeeded by Aristocracy?** — And what is to be said of Aristotle's cycle in connection with modern monarchies? Does any one suppose it possible that when the despotism of the Czar falls it will be succeeded by an aristocracy; or that when the modified authority of the emperors of Austria and Germany or the king of Italy still further exchanges substance for shadow, a limited class will succeed to the reality of power? Is there any longer any place between Monarchy and Democracy for Aristocracy? Has it not been crowded out?

1170. **English and Ancient Aristocracy contrasted.** — Indeed, since the extension of the franchise in England to the working classes, no example of a real Aristocracy is left in the modern world. At the beginning of this century the government of England, called a 'limited monarchy,' was in reality an Aristocracy. Parliament and the entire administration of the kingdom were in the hands of the classes having wealth or nobility. The members of the House of Lords and the crown together controlled a majority of the seats in the House of Commons. England was 'represented' by her upper classes almost exclusively. That Aristocracy has been set aside by the Reform Bills of 1832, 1867, and 1885; but it is worth while looking back to it, in order to contrast a modern type of Aristocracy with those ancient aristocracies which were present to the mind of Aristotle. An ancient Aristocracy *constituted* the state; the English aristocracy merely controlled the state. Under the widest citizenship known even to ancient democracy less than half the adult male subjects of the state shared the franchise. The ancient Democracy itself was a government by a minority. The ancient Aristocracy was a government by a still narrower minority; and this narrow

minority monopolized office and power not only, but citizenship as well. There were no citizens but they. They were the State. Every one else existed for the state, only they were part of it. In England the case was very different. There the franchise was not confined to the aristocrats; it was only controlled by them. Nor did the aristocrats of England consider themselves the whole of the State. They were quite conscious — and quite content — that they had the State virtually in their possession; but they looked upon themselves as holding it in trust for the people of Great Britain. Their legislation was, in fact, class legislation, after a very narrow sort; but they did not think that it was. They regarded their rule as eminently advantageous to the kingdom; and they unquestionably had, or tried to have, the real interests of the kingdom at heart. They led the state, but did not constitute it.

1171. **Present and Future Prevalence of Democracy.** — If Aristocracy seems about to disappear, Democracy seems about universally to prevail. Ever since the rise of popular education in the last century and its vast development since have assured a thinking weight to the masses of the people everywhere, the advance of democratic opinion and the spread of democratic institutions have been most marked and most significant. They have destroyed almost all pure forms of Monarchy and Aristocracy by introducing into them imperative forces of popular thought and the concrete institutions of popular representation; and they promise to reduce politics to a single pure form by excluding all other governing forces and institutions but those of a wide suffrage and a democratic representation, — by reducing all forms of government to Democracy.

1172. **Differences of Form between Ancient and Modern Democracies.** — The differences of form to be observed between ancient and modern Democracies are wide and important. Ancient Democracies were 'immediate'; ours are 'mediate,'

that is to say, *representative*. Every citizen of the Athenian State — to take that as a type — had a right to appear and vote in proper person in the popular assembly, and in those committees of that assembly which acted as criminal courts; the modern voter votes for a representative who is to sit for him in the popular chamber — he himself has not even the right of entrance there. This idea of representation — even the idea of a vote by proxy — was hardly known to the ancients; among us it is all-pervading. Even the elected magistrate of an ancient Democracy was not looked upon as a representative of his fellow-citizens. *He was the State*, so far as his functions went, and so long as his term of office lasted. He could break through all law or custom, if he dared. It was only when his term had expired and he was again a private citizen that he could be called to account. There was no impeachment while in office. To our thought all elected to office — whether Presidents, ministers, or legislators — are representatives. The limitations as to the size of the state involved in the absence from ancient conception of the principle of representation is obvious. A State in which all citizens were also legislators must of necessity be small. The modern representative state has no such limitation. It may cover a continent.

1173. **Nature of Democracy, Ancient and Modern.** — The differences of nature to be observed between ancient and modern Democracies are no less wide and important. The ancient Democracy was a class government. As already pointed out, it was only a broader Aristocracy. Its franchise was at widest an exclusive privilege, extending only to a minority. There were slaves under its heel; there were even freedmen who could never hope to enter its citizenship. Class subordination was of the essence of its constitution. From the modern Democratic State, on the other hand, both slavery and class subordination are excluded as inconsistent with its theory, not only, but, more than that, as antagonistic to its very being. Its citizenship is as wide as its native population; its suffrage



as wide as its qualified citizenship, — it knows no non-citizen class. And there is still another difference between the Democracy of Aristotle and the Democracy of de Tocqueville and Bentham. The citizens of the former lived for the State; the citizen of the latter lives for himself, and the State is for him. The modern Democratic State exists for the sake of the individual; the individual, in Greek conception, lived for the State. The ancient State recognized no personal rights — all rights were State rights; the modern State recognizes no State rights which are independent of personal rights.

1174. **Growth of the Democratic Idea.** — In making the last statement embrace 'the ancient State' irrespective of kind and 'the modern State,' of whatever form, I have pointed out what I conceive to be the cardinal difference between all the ancient forms of government and all the modern. It is a difference which I have already stated in another way. The *democratic idea* has penetrated more or less deeply all the advanced systems of government, and has penetrated them in consequence of that change of thought which has given to the individual an importance quite independent of his membership of a State. I can here only indicate the historical steps of that change of thought; I cannot go at any length into its causes.

1175. **Subordination of the Individual in the Ancient State.** — We have seen that, in the history of political society, if we have read that history aright, the rights of government — the magistracies and subordinations of kinship — antedate what we now call the rights of the individual. A man was at first nobody in himself; he was only the kinsman of somebody else. The father himself, or the chief, commanded only because of priority in kinship: to that all rights of all men were relative. Society was the unit; the individual the fraction. Man existed for society. He was all his life long in tutelage; only society was old enough to take charge of itself. The state was the only Individual.

1176. **Individualism of Christianity and Teutonic Institutions.** — There was no essential change in this idea for centuries. Through all the developments of government down to the time of the rise of the Roman Empire the State continued, in the conception of the western nations at least, to eclipse the individual. Private rights had no standing as against the State. Subsequently many influences combined to break in upon this immemorial conception. Chief among these influences were Christianity and the institutions of the German conquerors of the fifth century. Christianity gave each man a magistracy over himself by insisting upon his personal, individual responsibility to God. For right living, at any rate, each man was to have only his own conscience as a guide. In these deepest matters there must be for the Christian an individuality which no claim of his State upon him could rightfully be suffered to infringe. The German nations brought into the Romanized and partially Christianized world of the fifth century an individuality of another sort, — the idea of allegiance to individuals (sec. 228). Perhaps their idea that each man had a money-value which must be paid by any one who might slay him also contributed to the process of making men units instead of state-fractions; but their idea of personal allegiance played the more prominent part in the transformation of society which resulted from their western conquests. The Roman knew no allegiance save allegiance to his State. He swore fealty to his *imperator* as to a representative of that State, not as to an individual. The Teuton, on the other hand, bound himself to his leader by a bond of personal service which the Roman either could not understand or understood only to despise. There were, therefore, individuals in the German State: great chiefs or warriors with a following (*comitatus*) of devoted volunteers ready to die for them in frays not directed by the state, but of their own provoking (secs. 226–228). There was with all German tribes freedom of individual movement and combination within the ranks, — a wide play of indi-



vidual initiative. When the German settled down as master amongst the Romanized populations of western and southern Europe, his thought was led captive by the conceptions of the Roman law, as all subsequent thought that has known it has been, and his habits were much modified by those of his new subjects; but this strong element of individualism was not destroyed by the contact. It lived to constitute one of the chief features of the Feudal System.

1177. **The Transitional Feudal System.** — The Feudal System was made up of elaborate gradations of personal allegiance. The only State possible under that system was a disintegrate state embracing not a unified people, but a nation atomized into its individual elements. A king there might be, but he was lord, not of his people, but of his barons. He was himself baron also, and as such had many a direct subject pledged to serve him; but as king the barons were his only direct subjects; and the barons were heedful of their allegiance to him only when he could make it to their interest to be so, or their peril not to be. They were the kings of the people, who owed direct allegiance to them alone, and to the king only through them. Kingdoms were only greater baronies, baronies lesser kingdoms. One small part of the people served one baron, another part served another baron. As a whole they served no one master. They were not a whole: they were jarring, disconnected segments of a nation. Every man had his own lord, and antagonized every one who had not the same lord as he (secs. 238–243).

1178. **Rise of the Modern State.** — Such a system was, of course, fatal to peace and good government, but it cleared the way for the rise of the modern State by utterly destroying the old conception of the State. The State of the ancients had been an entity in itself — an entity to which the entity of the individual was altogether subordinate. The Feudal State was merely an aggregation of individuals, — a loose bundle of separated series of men knowing no common aim or action. It not

only had no actual unity: it had no thought of unity. National unity came at last, — in France, for instance, by the subjugation of the barons by the king (sec. 253); in England by the joint effort of people and barons against the throne, — but when it came it was the ancient unity with a difference. Men were no longer State fractions; they had become State integers. The State *seemed* less like a natural organism and more like a deliberately organized association. Personal allegiance to kings had everywhere taken the place of native membership of a body politic. Men were now subjects, not citizens.

1179. **Renaissance and Reformation.** — Presently came the thirteenth century with its wonders of personal adventure and individual enterprise in discovery, piracy, and trade. Following hard upon these, the Renaissance woke men to a philosophical study of their surroundings — and above all of their long-time unquestioned systems of thought. Then arose Luther to reiterate the almost forgotten truths of the individuality of men's consciences, the right of individual judgment. Ere long the new thoughts had penetrated to the masses of the people. Reformers had begun to cast aside their scholastic weapons and come down to the common folk about them, talking their own vulgar tongue and craving their acquiescence in the new doctrines of deliverance from mental and spiritual bondage to Pope or Schoolman. National literatures were born. Thought had broken away from its exclusion in cloisters and universities and had gone out to challenge the people to a use of their own minds. By using their minds, the people gradually put away the childish things of their days of ignorance, and began to claim a part in affairs. Finally, systematized popular education has completed the story. Nations are growing up into manhood. Peoples are becoming old enough to govern themselves.

1180. **The Modern Force of Majorities.** — It is thus no accident, but the outcome of great permanent causes, that there is no more to be found among the civilized races of Europe



any satisfactory example of Aristotle's Monarchies and Aristocracies. The force of modern governments is not now often the force of minorities. It is getting to be more and more the force of majorities. The sanction of every rule not founded upon sheer military despotism is the consent of a thinking people. Military despotisms are now seen to be necessarily ephemeral. Only monarchs who are revered as seeking to serve their subjects are any longer safe upon their thrones. Monarchies exist only by democratic consent.

1181. **New Character of Society.** — And, more than that, the result has been to give to society a new integration. The common habit is now operative again, not in acquiescence and submission merely, but in initiative and progress as well. Society is not the organism it once was, — its members are given freer play, fuller opportunity for origination; but its organic character is again prominent. It is the Whole which has emerged from the disintegration of feudalism and the specialization of absolute monarchy. The Whole, too, has become self-conscious, and by becoming self-directive has set out upon a new course of development.

XIV.

LAW: ITS NATURE AND DEVELOPMENT.

1182. **What Is Law?** — In the nature and development of Law three things stand revealed; namely, the nature, the functions, and the history of government. Law is the will of the State concerning the civic conduct of those under its authority. This will may be more or less formally expressed: it may speak either in custom or in specific enactment. Law may, moreover, be the will either of a primitive family-community such as we see in the earliest periods of history, or of a highly organized, fully self-conscious State such as those of our own day. But for the existence of Law there is needed in all cases alike (1) an organic community capable of having a will of its own, and (2) some clearly recognized body of rules to which that community has, whether by custom or enactment, given life, character, and effectiveness. The nature of each State, therefore, will be reflected in its law; in its law, too, will appear the functions with which it charges itself; and in its law will it be possible to read its history.

1183. **The Development of Law: its Sources.** — Law thus follows in its development, with slow, sometimes with uneven, but generally with quite distinct steps, the evolution of the character, the purposes, and the will of the organized community whose creation it is. The sources whence it springs, therefore, are as various as the means by which an organic community can shape and express its will as a body politic.



1184. **1. Custom.**[1] — Of course the earliest source of Law is custom, and custom is formed, no one can say definitely how, except that it is shaped by the co-operative action of the whole community, and not by any kingly or legislative command. It is not formed always in the same way; but it always rests upon the same foundation, upon the general acceptance of a certain course of action, that is, as best or most convenient. Whether custom originate in the well-nigh accidental formation of certain habits of action or in a conscious effort on the part of a community to adjust its practices more perfectly to its social and political objects, it becomes, when once it has been formed and accepted by the public authority, a central part of Law. It is difficult, if not impossible, to discover the exact point at which custom passes from the early inchoate state in which it is merely tending to become the express and determinate purpose of a community into the later stage in which it becomes Law; but we can say with assurance that it becomes Law only when it wins the support of a definite authority within the community. It is not Law if men feel free to depart from it.

1185. Under the reign of customary law that state of things actually did exist which modern law still finds it convenient to take for granted: everybody knew what the law was. The Teutonic hundred-moots, for example (sec. 654), the popular assemblies which tried cases under the early polity of our own ancestors, declared the law by the public voice; the people themselves determined what it was and how it should be applied. Custom grew up in the habits of the people; they consciously or unconsciously originated it; to them it was known and by them it was declared.

1186. **2. Religion.** — In the earliest times Custom and Religion are almost indistinguishable; a people's customs bear on every lineament the likeness of its religion. And in later stages of development Religion is still a prolific source of Cus-

[1] I adopt here the classification usual in English writings on Jurisprudence. See, *e.g.*, T. E. Holland, *Jurisprudence*, pp. 48 *et seq.*

tom. No primitive community contained any critic who could, even in his secret thought, separate Law from Religion. All rules of life bore for the antique mind the same sanction (sec. 30). There were not in its conception rules moral and rules political: morals and religion were indistinguishable parts of one great indivisible Law. Religion and Politics soon, indeed, came to have ...isters. In name often, if not always in fact, the pri... istinct from the magistrate. But throughout a ve... evelopment, as we have seen (secs. 50, 58, 69, 197), ...istrate either retained priestly functions or was dom... rules which the priest declared and of which the pri... he custodian.

Thus the early law of Rome was little more than a body of technical religious rules, a system of means for obtaining individual rights through the proper carrying out of certain religious formulæ (sec. 197); and it marked the beginning of the movement of Roman law towards a broad and equitable system of justice when these rules of procedure were changed from sacerdotal secrets into public law by the publication of the Twelve Tables.

118. 3. **Adjudication.** — One of the busiest and one of the most useful, because watchful, open-minded, and yet conservative, makers of Law under all systems has been the magistrate, the Judge. It is he who in his decisions recognizes and adopts Custom, and so gives it the decisive support of the public power; it is he who shapes written enactments into suitability to individual cases and thus gives them due flexibility and a free development. He is the authoritative voice of the community in giving specific application to its Law: and in doing this he necessarily becomes, because an interpreter, also a maker of Law. Whether deliberately or unconsciously, in expounding and applying he moulds and expands the Law. It is his legitimate function to read Law in the light of his own sober and conscientious judgment as to what is reasonable and just in custom, what practicable, rational, or equitable in legislation.



1188. It is this 'judge-made' law which is to be found, and is therefore so diligently sought for, in the innumerable law Reports cited in our courts. Except under extraordinary circumstances, our courts and those of England will always follow decisions rendered in similar cases by courts of equal jurisdiction in the same state. *A fortiori* do they follow the decisions of the highest courts: by these they are in a sense bound. In the courts of the continent of Europe, on the other hand, decisions are listened to as important expressions of opinion, but not as conclusive authority: are heard much as our own courts or those of England hear the decisions of courts of other states acting under like laws or similar circumstances.

1189. **4. Equity.** — Equity too is judge-made Law; but it is made, not in interpretation of, but in addition to, the laws which already exist. The most conspicuous types of such Law are the decisions of the Roman Prætor (secs. 201, 202) and those of the English Chancellor (sec. 666). These decisions were meant to give relief where existing law afforded none. The Prætor declared, for instance, that he would allow certain less formal processes than had hitherto been permitted to secure rights of property or of contract, of marriage or of control, etc. The English Chancellor, in like manner, as keeper of the king's judicial conscience, supplied remedies in cases for which the Common Law had no adequate processes, and thus relieved suitors of any hardships they might otherwise suffer from the fixity or excessive formality of the Common Law, and enabled them in many things to obtain their substantial rights without technical difficulty.

1190. After the official decrees of the Prætors had been codified by the Prætor Salvius Iulianus, in the time of the Emperor Hadrian, and still more after they had been embodied in the Code of Justinian, the *Corpus Juris Civilis*, the Prætor's 'equity' became as rigid and determinate as the law which it had been its function to mend and ameliorate. In the same manner, our own State codes, many of which have fused law and equity in the same courts and under common forms of procedure (sec. 955), have given equity the sanction and consequently the fixity of written law. The English Judicature Act, also, of 1873, merging, as it does, the Common-law and Equity courts into a single homo-

geneous system (sec. 732), shows at least a strong tendency in the same direction to exist in England. The adjustments of Equity are less needed now that legislation is ever active in mending old and creating new law and, when necessary, new procedure.

In the same case with Equity must be classed the numerous so-called 'fictitious actions' which were the invention of the Common-law courts and which, by means of imaginary suitors or imaginary transactions, duly recorded as if real, enabled things to be done and rights acquired which would have been impossible under any genuine process of the Common Law.

1191. **5. Scientific Discussion.** — The carefully formed opinions of learned text-writers have often been accepted as decisive of the Law: more often under the Roman system, however, than under our own (secs. 211–213), though even we have our Cokes, our Blackstones, our Storys, and our Kents, whom our courts hear with the greatest possible respect.

1192. **6. Legislation.** — That deliberate formulation of new Law to which the name Legislation is given is for us of the modern time, of course, the most familiar as well as the most prolific source of Law. For us Legislation is the work of representative bodies almost exclusively; but of course representation is no part of the essential character of the legislative act. Absolute magistrates or kings have in all stages of history been, under one system or another, plenipotent makers of laws. Whether acting under the sanction of Custom or under the more artificial arrangements of highly developed constitutions, father or prætor, king or archon has been a law-giver. So, too, the assemblies of free men which, alike in Greece and in Rome, constituted the legislative authority were not representative, but primary bodies, like the *Landsgemeinden* of the smaller Swiss cantons.

1193. Representation came in with the Germans; and with the critical development of institutions which the modern world has seen many new phases of Legislation have appeared. Modern Law has brought forth those great private corporations whose by-laws are produced by what may very fitly be called



private legislative action. We have, too, on the same model, chartered governments, with legislatures acting under special grants of law-making power (secs. 826, 886, 887, 890, 1137).

Legislation has had and is having a notable development, and is now the almost exclusive means of the formulation of new Law. Custom of the older sort, which gave us the great Common Law, has been in large part superseded by acts of legislatures; Religion stands apart, giving law only to the conscience; Adjudication is being more and more restricted by codification; Equity is being merged in the main body of the Law by enactment; Scientific Discussion now does hardly more than collate cases: all means of formulating Law tend to be swallowed up in the one great, deep, and broadening source, Legislation.

1194. **Custom Again.** — Custom now enters with a new aspect and a new method. After judges have become the acknowledged and authoritative mouthpieces of Equity and of the interpretative adaptation of customary or enacted Law; after scientific writers have been admitted to power in the systematic elucidation and development of legal principles; even after the major part of all law-making has fallen to the deliberate action of legislatures, given liberal commission to act for the community, Custom still maintains a presiding and even an imperative part in legal history. It is Custom, the silent and unconcerted but none the less prevalent movement, that is, of the common thought and action of a community, which recognizes changes of circumstance which judges would not, without its sanction, feel, or be, at liberty to regard in the application of old enactments, and which legislators have failed to give effect to, by repeal or new enactments. Laws become obsolete because silent but observant and imperative Custom makes evident the deadness of their letter, the inapplicability of their provisions. Custom, too, never ceases to build up practices legal in their character and yet wholly outside formal Law, constructing even, in its action on Congresses

and Parliaments, great parts of great constitutions (secs. 688, 1099, 1107). It constantly maintains the great forces of precedent and opinion which daily work their will, under every form of government, upon both the contents and the administration of Law. Custom is Habit under another name; and Habit in its growth contin sts itself, indeed, to the standard fixed in formal La o compels formal Law to conform to its abiding int Habit may be said to be the great Law within whic ng up. Laws can extend but a very little way beyo its. They may help it to gradual extensions of its s to slow modifications of its practices, but they cann abruptly or disregard it at all with impunity.

1195. The history of France during the present century affords a noteworthy example of these principles in the field of constitutional law. There we have witnessed this singular and instructive spectacle: a people made democratic in thought by the operation of a speculative political philosophy has adopted constitution after constitution created in the exact image of that thought. But they had, to begin with, absolutely no democratic habit — no democratic custom. Gradually that habit has grown, fostered amidst the developments of local self-direction; and the democratic thought has penetrated, wearing the body of practice, its only vehicle to such minds, to the rural populace. Constitutions and custom have thus advanced to meet one another — constitutions compelled to adopt precedent rather than doctrine as their basis, thought, practical experience rather than the abstract conceptions of philosophy; and habit constrained to receive the suggestions of written law. Now, therefore, in the language of one of her own writers, France has "a constitution the most summary in its text" (leaving most room, that is, for adjustments), "the *most customary in its application*, the most natural outcome of our manners and of the force of circumstances" that she has yet possessed.[1] Institutions too theoretical in their basis to live at first, have nevertheless furnished an *atmosphere* for the French mind and habit: that atmosphere has affected the life of France, — that life the atmosphere. The result some day to be reached will be normal liberty, political vitality and vigor, civil virility.

[1] Albert Sorel, *Montesquieu* (Am. trans.), pp. 200, 201.



1196. **Typical Character of Roman and English Law.** — Roman law and English law are peculiar among the legal systems of western Europe for the freedom and individuality of their development. Rome's *jus civile* was, indeed, deeply modified through the influence of the *jus gentium;* it received its philosophy from Greece, and took slight color from a hundred sources; and English law, despite the isolation of its island home, received its jury system and many another suggestion from the continent, and has been much, even if unconsciously, affected in its development by the all-powerful law of Rome. But English and Roman law alike have been much less touched and colored than other systems by outside influences, and have, each in its turn, presented to the world what may be taken as a picture of the natural, the normal, untrammelled evolution of law.

1197. **The Order of Legal Development.** — As tested by the history of these systems, the order in which I have placed the Sources of Law is seen to be by no means a fixed order of historical sequence. Custom is, indeed, the earliest fountain of Law, but Religion is a contemporary, an equally prolific, and in some stages of national development an almost identical source; Adjudication comes almost as early as authority itself, and from a very antique time goes hand in hand with Equity. Only Legislation, the conscious and deliberate origination of Law, and Scientific Discussion, the reasoned development of its principles, await an advanced stage of growth in the body politic to assert their influence in law-making. In Rome, Custom was hardly separable from Religion, and hid the knowledge of its principles in the breasts of a privileged sacerdotal class; among the English, on the contrary, Custom was declared in folk-moot by the voice of the people, — as possibly it had been among the ancestors of the Romans. In both Rome and England there was added to the influence of the magistrate who adopted and expanded Custom in his judgments the influence of the magistrate (Prætor or Chancellor)

who gave to Law the flexible principles and practices of Equity. And in both, Legislation eventually became the only source of Law.

1198. But in Rome Legislation grew up under circumstances entirely Roman, to which English history can afford no parallel. Rome gave a prominence to scientific discussion such as never gladdened the hearts of philosophical lawyers in England. The opinions of distinguished lawyers were given high, almost conclusive, authority in the courts; and when the days of codification came, great texts as well as great statutes and decrees were embodied in the codes of the Empire. The legislation of the popular assemblies, which Englishmen might very easily have recognized, was superseded in the days of the Empire by imperial edicts and imperial codes such as the history of English legislation nowhere shows; and over the formulation of these codes and edicts great jurists presided. The only thing in English legal practice that affords a parallel to the influence of lawyers in Rome is the cumulative authority of judicial opinions. That extraordinary body of precedent, which has become as much a part of the substance of English law as are the statutes of the realm, may be considered the contribution of the legal profession to the law of England.

1199. Savigny would have us seek in the history of every people for a childhood in which law is full of picturesque complexities, a period of form for form's sake and of symbols possessed of mystic significance; a period of adolescence in which a special class of practical jurists make their appearance and law begins to receive a conscious development; a full young manhood in which legislation plays a busy work of legal expansion and improvement; and an old age amusing itself with external and arbitrary changes in legal systems, and finally killed by the letter of the law.[1]

1200. **The Forces Operative in the Development of Law.** — The forces that create and develop law are thus seen to be

[1] Bluntschli, *Geschichte der neueren Staatswissenschaft*, ed. 1881, pp. 627, 628.



the same as those which are operative in national and political development. If that development bring forth monarchical forms of government, if the circumstances amidst which a people's life is cast eradicate habits of local self-rule and establish habits of submission to a single central authority set over a compacted state, that central authority alone will formulate and give voice to Law. If, on the other hand, the national development be so favorably cast that habits of self-reliance and self-rule are fostered and confirmed among the people, along with an active jealousy of any too great concentration of only partially responsible power, Law will more naturally proceed, through one instrumentality or another, from out the nation: *vox legis, vox populi.* But in the one case hardly less than in the other Law will express not the arbitrary, self-originative will of the man or body of men by whom it is formulated, but such rules as the body of the nation is prepared by reason of its habits and fixed preferences to accept. The function of the framers of Law is a function of formulation rather than of origination: no step that they can take successfully can lie far apart from the lines along which the national life has run. Law is the creation, not of individuals, but of the special needs, the special opportunities, the special perils or misfortunes of communities. No 'law-maker' may force upon a people Law which has not in some sense been suggested to him by the circumstances or opinions of the nation for whom he acts. Rulers, in all states alike, exercise the sovereignty of the community, but cannot exercise any other. The community may supinely acquiesce in the power arrogated to himself by the magistrate, but it can in no case make him independent of itself.

1201. Here again France furnishes our best illustration. We have a vivid confirmation of the truths stated in such an event as the establishment of the Second Empire. The French people were not duped by Louis Napoleon. The facts were simply these. They were keenly conscious that they were making a failure of the self-government which

they were just then attempting; they wanted order and settled rule in place of fears of revolution and the existing certainty of turbulent politics; and they took the simplest, most straightforward and evident means of getting what they wanted. The laws of Napoleon were in a very real sense their own creation.

1202. **The Power of the Community must be behind Law.** — The law of some particular state may seem to be the command of a minority only of those who compose the state: it may even in form utter only the will of a single despot; but in reality laws which issue from the arbitrary or despotic authority of the few who occupy the central seats of the state can never be given full effect unless in one form or another the power of the community be behind them. Whether it be an active power organized to move and make itself prevalent or a mere inert power lying passive as a vast immovable buttress to the great structure of absolute authority, the power of the community must support law or the law must be without effect. The bayonets of a minority cannot long successfully seek out the persistent disobediences of the majority. The majority must acquiesce or the law must be null.

1203. This principle is strikingly illustrated in the inefficacy of the English repressive laws in Ireland. The consent of the Irish community is not behind them, though the strength of England is, and they fail utterly, as all laws must which lack at least the passive acquiescence of those whom they concern.

1204. There can be no reasonable doubt that the power of Russia's Czar, vast and arbitrary as it seems, derives its strength from the Russian people. It is not the Czar's personal power; it is his power as head of the national church, as semi-sacred representative of the race and its historical development and organization. Its roots run deep into the tenacious, nourishing soil of immemorial habit. The Czar represents a history, not a caprice.

Temporary, fleeting despots, like the first Napoleon, lead nations with them by the ears, playing to their love of glory, to their sense of dignity and honor, to their ardor for achievement and their desire for order.

1205. **Roman Law an Example.** — The law of Rome affords in this respect an admirable example of the normal



character of law. It was the fundamental thought of Roman law that it was the will of the Roman people. The political liberty of the Roman consisted in his membership of the state and his consequent participation, either direct or indirect, in the utterance of law. As an individual he was subordinated to the will of the state; but his own will as a free burgess was a part of the state's will: the state spoke his sovereignty. He was an integral part of the organic community, his own power found its realization in the absolute *potestas et majestas populi*. This giant will of the people, speaking through the organs of the state, constituted a very absolute power, by which the individual was completely dominated; but individual rights were recognized in the *equality* of the law, in its purpose to deal equally with high and low, with strong and weak; and this was the Roman recognition of individual liberty.

1206. **The Power of Habit.** — Much of the truth with reference to the character and sanctions of law may be obscured by a failure to make just analysis of the part played by Habit in giving efficacy to enactment. Legislators, those who exercise the sovereignty of a community, build upon the habit of their so-called 'subjects.' If they be of the same race and sharers of the same history as those whom they rule, their accommodation of their acts to the national habit will be in large part unconscious: that habit runs in their veins as in the veins of the people. If they be invaders or usurpers, they avoid crossing the prejudices or the long-abiding practices of the nation out of caution or prudence. In any case their activity skims but the surface, avoids the sullen depths of the popular life. They work arbitrary decrees upon individuals, but they are balked of power to turn about the life of the mass: that they can effect only by slow and insidious measures which almost insensibly deflect the habits of the people into channels which lead away from old into new and different methods and purposes. The habit of the nation is the material on which the legislator works; and its qualities constitute the

limitations of his power. It is stubborn material, and dangerous. If he venture to despise it, it forces him to regard and humor it; if he would put it to unaccustomed uses, it balks him; if he seek to force it, it will explode in his hands and destroy him. The sovereignty is not his, but only the leadership.

1207. **Law's Utterance of National Character.** — Law thus normally speaks the character, the historical habit and development of each nation. There is no universal law, but for each nation a law of its own which bears evident marks of having been developed along with the national character, which mirrors the special life of the particular people whose political and social judgments it embodies (sec. 1196). The despot may be grossly arbitrary; he may violate every principle of right in his application of the law to individuals; he may even suspend all justice in individual cases; but the law, the principles which he violates or follows at pleasure, he takes from the people whom he governs, extracts from their habit and history. What he changes is the application merely, not the principles, of justice; and he changes that application only with reference to a comparatively small number of individuals whom he specially picks out for his enmity or displeasure. He cannot violently turn about the normal processes of the national habit.

1208. **Germanic Law.** — We have in Germanic law an example of the influence of national character upon legal systems as conspicuous as that afforded by Roman law itself, and the example is all the more instructive when put alongside of the Roman because of the sharpness of the contrasts between Roman and Germanic legal conceptions. Although as like the Romans in practical political sagacity and commonsense legal capacity, the Germans had quite other conceptions at to the basis and nature of law. Their law spoke no such realization of the public power, and consequently no such intense realization of organic unity. The individual German



was, so to say, given play outside the law; his rights were not relative, but absolute, self-centred. It was the object of the public polity rather to give effect to individual worth and liberty than to build together a compact, dominant community. German law, therefore, took no thought for systematic equality, but did take careful thought to leave room for the fullest possible assertion of that individuality which must inevitably issue in inequality. It was a flexible framework for the play of individual forces. It lacked the organic energy, the united, triumphant strength of the Roman system; but it contained untold treasures of variety and of individual achievement. It, no less than Roman law, rested broadly upon national character; and it was to supply in general European history what the Roman system could not contribute.

1209. **Sovereignty: Who gives Law?** — If, then, law be a product of national character, if the power of the community must be behind it to give it efficacy, and the habit of the community in it to give it reality, where is the seat of sovereignty? Whereabouts and in whom does sovereignty reside, and what is Sovereignty? These, manifestly, are questions of great scope and complexity, and yet questions central to a right understanding of the nature and genesis of law. It will be best to approach our answers to them by way of illustrations.

In England, sovereignty is said to rest with the legislative power: with Parliament acting with the approval of the Crown, or, not to disuse an honored legal fiction, with the Crown acting with the assent of Parliament. Whatever an Act of Parliament prescribes is law, even though it contravene every principle, constitutional or only of private right, recognized before the passage of the Act as inviolable. Such is the theory. The well-known fact is, that Parliament dare do nothing that will even seem to contravene principles held to be sacred in the sphere either of constitutional privilege or private right. Should Parliament violate such principles, their action would be repudiated by the nation, their will, failing

to become indeed law, would pass immediately into the limbo of things repealed; Parliament itself would be purged of its offending members. Parliament, then, is master, is an utterer of valid commands, only so far as it interprets, or at least does not cross, the wishes of the people. Whether or not, therefore, it be possible to say with the approval of those who insist upon maintaining the rules of a strict abstract logic that the sovereignty of Parliament is limited *de jure*, that is, in law, it is manifestly the main significant truth of the case that parliamentary sovereignty is most imperatively limited *de facto*, in fact. Its actual power is not a whit broader for having a free field in law, that is, above the fences, so long as the field in which it really moves is fenced high about by firm facts.

1210. Again, it is said, apparently with a quite close regard for the facts, that in Russia sovereignty is lodged with the Czar, the supreme master "of all the Russias." That his will is law Siberia attests and Nihilism recognizes. But is there no *de facto* limitation to his supremacy? How far could he go in the direction of institutional construction? How far could he succeed in giving Russia at once and out of hand the institutions, and Russians the liberties, of the United States and its people? How far would such a gift be law? Only so far as life answered to its word of command. Only so far as Russian habit, schooled by centuries of obedience to a bureaucracy, could and would respond to its invitation. Only so far, in a word, as the new institutions were accepted. The measure of the Czar's sovereignty is the habit of his people; and not their habit only, but their humor also, and the humor of his officials. His concessions to the restless spirit of his army, to the prejudices of his court, and to the temper of the mass of his subjects, his means of keeping this side assassination or revolution, nicely mark the boundaries of his sovereignty.

1211. Sovereignty, therefore, as ideally conceived in legal theory, nowhere actually exists. The sovereignty which does exist is something much more vital, though, like most living



things, much less easily conceived. It is the will of an organized independent community, whether that will speak in acquiescence merely, or in active creation of the forces and conditions of politics. The kings or parliaments who serve as its vehicles utter it, but they do not possess it. Sovereignty resides in the community; but its organs, whether those organs be supreme magistrates, busy legislatures, or subtle privileged classes, are as various as the conditions of historical growth have commanded.

1212. **Certain Legal Conceptions Universal.** — The correspondence of law with national character, its basis in national habit, does not deprive it of all universal characteristics. Many common features it does wear among all civilized peoples. As the Romans found it possible to construct from the diversified systems of law existing among the subject peoples of the Mediterranean basin, a certain number of general maxims of justice out of which to construct the foundation of their *jus gentium*, so may jurists to-day discover in all systems of law alike certain common moral judgments, a certain evidence of unity of thought regarding the greater principles of equity. There is a common legal conscience in mankind.

> Thus, for example, the sacredness of human life; among all Aryan nations at least, the sanctity of the nearer family relationships; in all systems at all developed, the plainer principles of 'mine' and 'thine'; the obligation of promises; many obvious duties of man to man suggested by the universal moral consciousness of the race, receive recognition under all systems alike. Sometimes resemblances between systems the most widely separated in time and space run even into ceremonial details, such as the emblematic transfer of property, and into many details of personal right and obligation.

1213. **Law and Ethics.** — It by no means follows, however, that because law thus embodies moral judgments of the race on many points of personal relation and individual conduct, it is to be considered a sort of positive concrete Ethics, — Ethics crystallized into definite commands towards which the branch

of culture which we call 'Ethics' stands related as theory to practice. Ethics concerns the whole walk and conversation of the individual, it touches the rectitude of each man's life, the truth of his dealings with his own conscience, the whole substance of character and conduct, righteousness both of act and of mental habit. Law, on the other hand, concerns only man's life in society. It not only confines itself to controlling the outward acts of men; it limits itself to those particular acts of man to man which can be regulated by the public authority, and which can be regulated in accordance with uniform rules applicable to all alike and in an equal degree. It does not essay to punish untruthfulness as such, it only annuls contracts obtained by fraudulent misrepresentation and makes good such pecuniary damage as the deceit may have entailed; it does not censure ingratitude or any of the subtler forms of faithlessness, it only denounces its penalties against open and tangible acts of dishonesty; it does not assume to be the guardian of men's character, it only stands with a whip for those who give overt proof of bad character in their dealings with their fellow-men. Its limitations are thus limitations both of kind and of degree. It addresses itself to the regulation of outward conduct only: that is its limitation of kind; and it regulates outward conduct only so far as workable and uniform rules can be found for its regulation: that is its limitation of degree.

1214. **Mala Prohibita.** — Law thus plays the rôle neither of conscience nor of Providence. More than this, it follows standards of policy only, not absolute standards of right and wrong. Many things that are wrong, even within the sphere of social conduct, it does not prohibit; many things not wrong in themselves it does prohibit. It thus creates, as it were, a new class of wrongs, relative to itself alone: *mala prohibita*, things wrong because forbidden. In keeping the commands of the state regarding things fairly to be called indifferent in themselves men are guided by their *legal* conscience.



Society rests upon obedience to the laws: laws determine the rules of social convenience as well as of social right and wrong; and it is as necessary for the perfecting of social relationships that the rules of convenience be obeyed as it is that obedience be rendered to those which touch more vital matters of conduct.

Thus it cannot be said to be inherently wrong for a man to marry his deceased wife's sister; but if the laws, seeking what is esteemed to be a purer order of family relationships, forbid such a marriage, it becomes *malum prohibitum*: it is wrong because illegal.

It would certainly not be wrong for a trustee to buy the trust estate under his control if he did so in good faith and on terms manifestly advantageous to the persons in whose interest he held it; but it is contrary to wise public policy that such purchases should be allowed, because a trustee would have too many opportunities for unfair dealing in such transactions. The law will under no circumstances hold the sale of a trust estate to the trustee valid. Such purchases, however good the faith in which they are made, are *mala prohibita*.

Or take, as another example, police regulations whose only object is to serve the convenience of society in crowded cities. A street parade, with bands and banners and men in uniform is quite harmless and is immensely pleasing to those who love the glitter of epaulettes and brass buttons and the blare of trumpets; but police regulations must see to it that city streets are kept clear for the ordinary daily movements of the busy city population, and to parade without license is *malum prohibitum*.

1215. In all civilized states law has long since abandoned all attempts to regulate conscience or opinion; it would find it, too, both fruitless and unwise to essay any regulation of conduct, however reprehensible in itself, which did not issue in definite and tangible acts of injury to others; but it does seek to command the outward conduct of men in their palpable dealings with each other in society. Law is the mirror of active, organic political life. It may be and is instructed by the ethical judgments of the community, but its own province is not distinctively ethical; it may regard religious principle, but it is not a code of religion. Ethics has been called the science of the well-being of man, law the science of his right civil conduct. Ethics concerns the development of

character; religion, the development of man's relations with God; law, the development of men's relations to each other in society. Ethics, says Mr. Sidgwick, "is connected with politics so far as the well-being of any individual man is bound up with the well-being of his society."

1216. **International Law.** — The province of international law may be described as a province half way between the province of morals and the province of positive law. It is law without a forceful sanction. There is no earthly power of which all nations are subjects; there is no power, therefore, to enforce obedience to rules of conduct as between nation and nation. International law is, moreover, a law which rests upon those uncodified, unenacted principles of right action, of justice, and of consideration which have so universally obtained the assent of men's consciences, which have so universal an acceptance in the moral judgments of men everywhere, that they have been styled Laws of Nature (secs. 208–9), but which have a nearer kinship to ethical maxims than to positive law. "The law of nations," says Bluntschli, "is that recognized universal Law of Nature which binds different states together in a humane jural society, and which also secures to the members of different states a common protection of law for their general human and international rights."[1] Its only formal and definite foundations aside from the conclusions of those writers who, like Grotius and Vattel, have given to it distinct statements of what they conceived to be the leading, the almost self-evident principles of the Law of Nature, are to be found in the treaties by which states, acting in pairs or in groups, have agreed to be bound in their relations with each other, and in such principles of international action as have found their way into the statutes or the established judicial precedents of enlightened individual states. More and more, international conventions come to recognize

[1] *Das Völkerrecht*, sec. I.



in their treaties certain elements of right, of equity, and of comity as settled, as always to be accepted in transactions between nations. The very jealousies of European nations have contributed to swell the body of accepted treaty principles. As the practice of concerted action by the states of the continent of Europe concerning all questions of large interest, the practice of holding great Congresses like those of Vienna in 1815, of Paris in 1856, and of Berlin in 1878 has grown into the features of a custom, so has the body of principles which are practically of universal recognition increased. International law, says Dr. Bulmerincq, "is the totality of legal rules and institutions which have developed themselves touching the relations of states to one another." [1]

1217. International law is, therefore, not law at all in the strict sense of the term. It is not, as a whole, the will of any state: there is no authority set above the nations whose command it is. In one aspect, the aspect of Bluntschli's definition, it is simply the body of rules, developed out of the common moral judgments of the race, which *ought* to govern nations in their dealings with each other. Looked at from another, from Dr. Bulmerincq's, point of view, it is nothing more than a generalized statement of the rules which nations have actually recognized in their treaties with one another, made from time to time, and which by reason of such precedents are coming more and more into matter-of-course acceptance.

These rules concern the conduct of war, diplomatic intercourse, the rights of citizens of one country living under the dominion of another, jurisdiction at sea, etc. Extradition principles are settled almost always by specific agreement between country and country, as are also, of course, commercial arrangements, fishing rights, and all similar matters not of universal bearing. But even in such matters example added to example is turning nations in the direction of uniform principles, such, for in-

[1] *Das Völkerrecht* (in Marquardsen's *Handbuch*, Vol. I.), sec. I. of the monograph.

stance, as this, that political offences shall not be included among extraditable crimes, unless they involve ordinary crimes of a very heinous nature, such as murder.

1218. **Laws of Nature and Laws of the State.** — The analogy between political laws, the laws which speak the will of the state, and natural laws, the laws which express the orderly succession of events in nature, has often been dwelt upon, and is not without instructive significance. In the one set of laws as in the other, there is, it would seem, a uniform prescription as to the operation of the forces that make for life. The analogy is most instructive, however, where it fails: it is more instructive, that is, to note the contrasts between the laws of nature and laws of the state than to note such likeness as exists between them. The contrasts rather than the resemblances serve to make evident the real nature of political regulation. "Whenever we have made out by careful and repeated observation," says Professor Huxley, "that something is always the cause of a certain effect, or that certain events always take place in the same order, we speak of the truth thus discovered as a law of nature. Thus it is a law of nature that anything heavy falls to the ground if it is unsupported. . . . But the laws of nature are not the causes of the order of nature, but only our way of stating as much as we have made out of that order. Stones do not fall to the ground in consequence of the law just stated, as people sometimes carelessly say; but the law is a way of asserting that which invariably happens when heavy bodies at the surface of the earth, stones among the rest, are free to move." Whatever analogies may exist between such generalized statements of physical fact and the rules in accordance with which men are constrained to act in organized civil society it may be profitable for the curious carefully to inquire into. What it is most profitable for the student of politics to observe is the wide difference between the two, which Professor Huxley very admirably states as follows: "Human law consists of com-



mands addressed to voluntary agents, which they may obey or disobey; and the law is not rendered null and void by being broken. Natural laws, on the other hand, are not commands, but assertions respecting the invariable order of nature; and they remain law only so long as they can be shown to express that order. To speak of the violation or suspension of a law of nature is an absurdity. All that the phrase can really mean is that, under certain circumstances, the assertion contained in the law is not true; and the just conclusion is, not that the order of nature is interrupted, but that we have made a mistake in stating that order. A true natural law is a universal rule, and, as such, admits of no exception."[1] In brief, human choice enters into the laws of the state, whereas from natural laws that choice is altogether excluded: they are dominated by fixed necessity. Human choice, indeed, enters every part of political law to modify it. It is the element of change; and it has given to the growth of law a variety, a variability, and an irregularity which no other power could have imparted.

1219. **Limitations of Political Law.** — We have thus laid bare to our view some of the most instructive characteristics of political law. The laws of nature state effects invariably produced by forces of course adequate to produce them; but behind political laws there is not always a force adequate to produce the effects which they are designed to produce. The force, the *sanction*, as jurists say, which lies behind the laws of the state is the organized armed power of the community: compulsion raises its arm against the man who refuses to obey (sec. 1154). But the public power may sleep, may be inattentive to breaches of law, may suffer itself to be bribed, may be outwitted or thwarted: laws are not always 'enforced.' This element of weakness it is which opens up to us one aspect at least of the nature of Law: Law is no more efficient than the

[1] These passages are taken from Professor Huxley's *Science Primer. Introductory.*

state whose will it utters. The law of Turkey shares all the imperfections of the Turkish power; the laws of England bespeak in their enforcement the efficacy of English government. Good laws are of no avail under a bad government; a weak, decadent state may speak the highest purposes in its statutes and yet do the worst things in its actual administration. Commonly, however, law embodies the real purposes of the state, and its enforcement is a matter of administrative capacity or of concerted power simply.

1220. **Public Law.** — The two great divisions under which law may best be studied are these: (1) *Public Law*, (2) *Private Law*. Public law is that which immediately concerns the being, the structure, the functions, and the methods of the state. Taken in its full scope, it includes not only what we familiarly know as constitutional law, but also what is known as administrative law, and all that part of criminal law which affects crimes against the state itself, against the community as a whole. In brief, it is that portion of law which determines a state's own character and its relations to its citizens.

1221. **Private Law.** — Private law, on the other hand, is that portion of positive law which secures to the citizen his rights as against the other citizens of the state. It seeks to effect justice between individual and individual; its sphere is the sphere of individual right and duty.

1222. It is to the Romans that we are indebted for a first partial recognition of this important division in the province of Law, though later times have given a different basis to this distinction. I say 'indebted because the distinction between public and private law has the most immediate connections with individual liberty. Without it, we have the state of affairs that existed in Greece, where there was no sphere which was not the state's (sec. 1236); and where the sphere of the state's relations to the individual was as wide as the sphere of the law itself. Individual liberty can exist only where it is recognized that there are rights which the state does not create, but only secures.

1223. **Jurisprudence.** — Jurisprudence is a term of much latitude, but must be taken strictly to mean the Science of



Law. The science of law, of course, is complete only when it has laid bare both the nature and the genesis of law: the nature of law must be obscure until its genesis and the genesis of the conceptions upon which it is based have been explored; and that genesis is a matter, not of logical analysis, but of history. Many writers upon jurisprudence, therefore, have insisted upon the historical method of study as the only proper method. They have sought in the history of society and of institutions the birth and development of jural conceptions, the growths of practice which have expanded into the law of property or of torts, the influences which have contributed to the orderly regulation of man's conduct in society.

1224. In the hands of another school of writers, however, jurisprudence has been narrowed to the dimensions of a science of law in its modern aspects only. They seek to discover, by an analysis of law in its present full development, the rights which habitually receive legal recognition and the methods by which states secure to their citizens their rights, and enforce upon them their duties, by positive rules backed by the abundant sanction of the public power. In their view, not only is the history of law not jurisprudence, but, except to a very limited extent, it is not even the material of jurisprudence. Its material is law as it presently exists: the history of that law is only a convenient light in which the real content and purpose of existing law may be made plainer to the analyst. The conclusions of these writers are subject to an evident limitation, therefore; their analysis of law, being based upon existing legal systems alone and taking the fully developed law for granted, applies to law in the earlier stages of society only by careful modification, only by more or less subtle and ingenious accommodation of the meaning of its terms.

1225. Historical jurisprudence alone, — a science of law, that is, constructed by means of the historical analysis of law and always squaring its conclusions with the history of society, — can serve the student of politics. The processes of analyti-

cal jurisprudence, however, having been conducted by minds of the greatest subtlety and acuteness, serve a very useful purpose in supplying a logical structure of thought touching full-grown systems of law.

1226. **The Analytical Account of Law.** — In the thought of the analytical school every law is a command, "an order issued by a superior to an inferior." "Every positive law is 'set by a sovereign person, or sovereign body of persons, to a member or members of the independent political society wherein that person or body of persons is sovereign or superior.'" In its terms, manifestly, such an analysis applies only to times when the will of the state is always spoken by a definite authority; not with the voice of custom, which proceeds no one knows whence; not with the voice of religion, which speaks to the conscience as well as to the outward life, and whose sanctions are derived from the unseen power of a supernatural being; nor yet with the voice of scientific discussion, whose authors have no authority except that of clear thought; but with the distinct accents of command, with the voice of the judge and the legislator.

1227. **The Analytical Account of Sovereignty.** — The analytical account of sovereignty is equally clear-cut and positive. Laws, "being commands, emanate from a determinate source," from a sovereign authority; and analytical jurisprudence is very strict and formal in its definition of sovereignty. A sovereign "is a determinate person, or body of persons, to whom the bulk of the members of an organized community are in the habit of rendering obedience and who are themselves not in the habit of rendering obedience to any human superior."

It follows, of course, that no organic community which is not independent can have a law of its own. The law of the more fully developed English colonies, for example, though it is made by the enactment of their own parliaments, is not law by virtue of such enactment, because those parliaments are in the habit of being obedient to the authorities in London and are not themselves sovereign, therefore. The sovereignty which lies back of all law in the colonies is said to be the sovereignty of the parliament of England.

1228. It would seem to follow that our own federal authorities are



sovereign. They are a determinate body of persons to whom the bulk of the nation is habitually obedient and who are themselves obedient to no human superior. But then what of the authority of the states in that great sphere of action which is altogether and beyond dispute their own (sec. 889), which the federal authorities do not and cannot enter, within which their own people are habitually obedient to them, and in which they are not subject to any earthly superior? It has been the habit of all our greater writers and statesmen to say that with us sovereignty is divided; but the abstract sovereignty of which the legal analyst speaks is held to be indivisible: it must be whole. Analysis, therefore, is driven to say that with us sovereignty rests in its entirety with that not very determinate body of persons, the people of the United States, the *powers* of sovereignty resting with the state and federal authorities by delegation from the people.

The difficulty of applying the analytical account of sovereignty to our own law is in large part avoided if law be defined as "the command of an authorized public organ, acting within the sphere of its competence. What organs are authorized, and what is the sphere of their competence, is of course determined by the organic law of the state; and *this* law is the direct command of the sovereign."[1] The only difficulty left by this solution is that of making room in our system for both a sovereign people of the single state and a sovereign people of the Union.

1229. **Summary.** — Law, then, is the determinate will of the state concerning the civic conduct of those under its authority. Spoken first in the slow and general voice of custom, it speaks at last in the clear, the multifarious, the active tongues of legislation. It grows with the growth of the community: it cannot outrun the conscience of the community and be real, it cannot outlast its judgments and retain its force. It mirrors social advance: if it anticipate the development of the public thought, it must wait until the common judgment and conscience grow up to its standards before it can have life; if it lag behind the common judgment and conscience, it must become obsolete, and will come to be more honored in the breach than in the observance.

[1] This definition I have taken the liberty of extracting from some very valuable notes on this chapter kindly furnished me by a friend who upon this subject speaks authoritatively.

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XV.

THE FUNCTIONS OF GOVERNMENT.

1230. **What are the Functions of Government?** — The question has its own difficulties and complexities: it cannot be answered out of hand and in the lump, as the physiologist might answer the question, What are the functions of the heart? In its *nature* government is one, but in its *life* it is many: there are governments *and* governments. When asked, therefore, What are the functions of government? we must ask in return, Of what government? Different states have different conceptions of their duty, and so undertake different things. They have had their own peculiar origins, their own characteristic histories; circumstance has moulded them; necessity, interest, or caprice has variously guided them. Some have lingered near those primitive institutions which all once knew and upheld together; others have quite forgotten that man ever had a political childhood and are now old in complex practices of national self-government.

1231. **The Nature of the Question.** — It is important to notice at the outset a single general point touching the nature of this question. It is in one aspect obviously a simple *question of fact;* and yet there is another phase of it, in which it becomes as evidently a question of opinion.

The distinction is important because over and over again the question of fact has been confounded with that very widely different question, *What ought the functions of government to be?* The two questions should be kept entirely separate in

treatment. Under no circumstances may we instructively or safely begin with the question of opinion: the answer to the question of fact is the indispensable foundation to all sound reasoning concerning government, which is at all points based upon experience rather than upon theory. The facts of government mirror the principles of government in operation. What government does must arise from what government is: and what government is must determine what government ought to do. The present chapter, therefore, will confine itself to the question of fact: the question of opinion will be broached and partially answered in Chapter XVI.

1232. **Classification.** — It will contribute to clearness of thought to observe the functions of government in two groups, I. *The Constituent* Functions, II. *The Ministrant*. Under the *Constituent* I would place that usual category of governmental function, the protection of life, liberty, and property, together with all other functions that are necessary to the civic organization of society, — functions which are *not optional* with governments, even in the eyes of strictest *laissez faire*, — which are indeed the very bonds of society. Under the *Ministrant* I would range those other functions (such as education, posts and telegraphs, and the care, say, of forests) which are undertaken, not by way of *governing*, but by way of advancing the general interests of society, — functions which *are* optional, being necessary only according to standards of convenience or expediency, and not according to standards of existence; functions which assist without constituting social organization.

Of course this classification is based primarily upon objective and practical distinctions and cannot claim philosophic completeness. There may be room for question, too, as to whether some of the functions which I class as Ministrant might not quite as properly have been considered Constituent; but I must here, of course, simply act upon my own conclusions without rearguing them, acknowledging by the way that the line of demarcation is not always perfectly clear.

"The admitted functions of government," said Mr. Mill, "embrace a much wider field than can easily be included within the ring-fence of

any restrictive definition, and it is hardly possible to find any ground of justification common to them all, except the comprehensive one of general expediency."

1233. **I. The Constituent Functions:**

(1) The keeping of order and providing for the protection of persons and property from violence and robbery.
(2) The fixing of the legal relations between man and wife and between parents and children.
(3) The regulation of the holding, transmission, and interchange of property, and the determination of its liabilities for debt or for crime.
(4) The determination of contract rights between individuals.
(5) The definition and punishment of crime.
(6) The administration of justice in civil causes.
(7) The determination of the political duties, privileges, and relations of citizens.
(8) Dealings of the state with foreign powers: the preservation of the state from external danger or encroachment and the advancement of its international interests.

These will all be recognized as functions which are obnoxious not even to the principles of Mr. Spencer,[1] and which of course persist under every form of government.

1234. **II. The Ministrant Functions.** — It is hardly possible to give a complete list of those functions which I have called Ministrant, so various are they under different systems of government; the following partial list will suffice, however, for the purposes of the present discussion:

(1) The regulation of trade and industry. Under this head I would include the coinage of money and the establishment of standard weights and measures, laws against forestalling, engrossing, the licensing of trades, etc., as well as the great matters of tariffs, navigation laws, and the like.

[1] As set forth in his pamphlet, *Man versus the State*.

(2) The regulation of labor.
(3) The maintenance of thoroughfares, — including state management of railways and that great group of undertakings which we embrace within the comprehensive terms 'Internal Improvements' or 'The Development of the Country.'
(4) The maintenance of postal and telegraph systems, which is very similar in principle to (3).
(5) The manufacture and distribution of gas, the maintenance of water-works, etc.
(6) Sanitation, including the regulation of trades for sanitary purposes.
(7) Education.
(8) Care of the poor and incapable.
(9) Care and cultivation of forests and like matters, such as the stocking of rivers with fish.
(10) Sumptuary laws, such as 'prohibition' laws, for example.

These are all functions which, in one shape or another, all governments alike have undertaken. Changed conceptions of the nature and duty of the state have arisen, issuing from changed historical conditions, deeply altered historical circumstance, and part of the change which has thus affected the idea of the state has been a change in the method and extent of the exercise of governmental functions; but changed conceptions have left the functions of government *in kind* the same. Diversities of conception are very much more marked than diversities of practice.

1235. The following may be mentioned among ministrant functions not included under any of the foregoing heads, and yet undertaken by more than one modern government: the maintenance of savings-banks, especially for small sums (*e.g.*, the English postal savings-bank), the issuance of loans to farmers, and the maintenance of agricultural institutes (as in France), and the establishment of insurance for workingmen (as in Germany).

1236. **History of Governmental Function: Province of the Ancient State.** — Notable contrasts both of theory and of practice separate governments of the ancient omnipotent from governments of the modern constitutional type. The ancient state, standing very near, as it did, in its thought, to that time, still more remote, when the State was the Kin, knew nothing of individual rights as contrasted with the rights of the state. "The nations of Italy," says Mommsen, "did not merge into that of Rome more completely than the single Roman burgess merged in the Roman community." And Greece was not a whit behind Rome in the absoluteness with which she held the subordination of the individual to the state.

1237. This thought is strikingly visible in the writings of Plato and Aristotle, not only in what they say, but also, and even more, in what they do not say. The ideal Republic of which Plato dreams is to prescribe the whole life of its citizens; but there is no suggestion that it is to be set up under cover of any new conception as to what the state may legitimately do, — it is only to make novel experiments in legislation under the *old* conception. And Aristotle's objection to the utopian projects of his master is not that they would be socialistic (as we should say), but merely that they would be unwise. He does not fear that in such a republic the public power would prove to have been exalted too high; but, speaking to the policy of the thing, he foresees that the citizens would be poor and unhappy. The state may do what it will, but let it be wise in what it does. There is no one among the Greeks to deny that it is the duty of the state to make its citizens happy and prosperous; nay, to *legislate* them happy, if legislation may create fair skies and kind fortune; the only serious quarrel concerns the question, What laws are to be tried to this end?

1238. **Roman Conception of Private Rights.** — Roman principles, though equally extreme, were in some respects differently cast. That superior capacity for the development of law, which made the Romans singular among the nations of antiquity, showed itself in respect of the functions of government in a more distinct division between public and private rights than obtained in the polity of the Greek cities. An ex-

amination of the conception of the state held in Rome reveals the singular framework of her society. The Roman family did not suffer that complete absorption into the City which so early overtook the Greek family. Private rights were not individual rights, but family rights: and family rights did not so much curtail as supplement the powers of the community. The family was an indestructible *organ of the state*. The father of a family, or the head of a gens, was in a sense a member of the official hierarchy of the City, — as the king, or his counterpart the consul, was a greater father: there was no distinction of principle between the power of king or consul and the power of a father; it was a mere difference of sphere, a division of functions.

A son was, for instance, in some things exempt from the authority of the City only because he was in those things still subject, because his father still lived, to the dominion of that original state, the family. There was not in Rome that separation of the son from the family at majority which characterizes the Greek polity, as it now characterizes our own. The father continued to be a ruler, an hereditary state officer, within the original sphere of the family life, the large sphere of individual privilege and property.

1239. This essential unity of state and family furnishes us with the theoretic measure of state functions in Rome. The Roman burgess was subordinated, not to the public authority exactly, but rather to the *public order*, to the conservative integrity of the community. He was subject to a law which embodied the steady, unbroken habit of the State-family. He was not dominated, but merged.

1240. **Powers of the Roman Senate.** — The range of state power in ancient times, as a range broken only by limits of habit and convenience, is well illustrated in the elastic functions of the Roman Senate during the period of the Republic. With an unbroken life which kept it conscious of every tradition and familiar with every precedent; with established standards of tested experience and cautious expediency, it was able to direct the movements of the compact society at whose sum-

mit it sat, as the brain and consciousness direct the movements of the human body; and it is evident from the freedom of its discussions and the frequency of its actions upon interests of every kind, whether of public or of private import, that the Roman state, as typified in its Senate, was in its several branches of family, tribe, and City, a single undivided whole, and that its prerogatives were limited by nothing save religious observance and fixed habit. Of that individual liberty which we cherish it knew nothing.

1241. **Government the Embodiment of Society.** — As little was there in Greek politics any seed of the thought which would limit the sphere of governmental action by principles of inalienable individual rights. Both in Greek and in Roman conception government was as old as society, — was indeed nothing less than the express image and embodiment of society. In government society lived and moved and had its being. Society and government were one, in some such sense as the spirit and body of man are one: it was through government, as through mouth and eyes and limbs, that society realized and gave effect to its life. Society's prejudices, habits, superstitions did indeed command the actions of government; but only because society and government were one and the same, not because they were distinct and the one subordinate to the other. In plain terms, then, the functions of government had no limits of principle, but only certain limits of wont and convenience, and the object of administration was nothing less than to help society on to all its ends: to speed and facilitate all social undertakings. So far as full citizens of the state were concerned, Greek and Roman alike was what we should call a socialist; though he was too much in the world of affairs and had too keen an appreciation of experience, too keen a sense of the sane and possible, to attempt the Utopias of which the modern socialist dreams, and with which the ancient citizen's own writers sometimes amused him. He bounded his politics by common sense, and so dispensed with 'the rights of man.'

1242. **Feudalism: Functions of Government Functions of Proprietorship.** — Individual rights, after having been first heralded in the religious world by the great voice of Christianity, broke into the ancient political world in the person of the Teuton. But the new politics which the invader brought with him was not destined to establish at once democratic equality: that was a work reserved for the transformations of the modern world. Meantime, during the Middle Ages, government, as we conceive government, may be said to have suffered eclipse. In the Feudal System the constituent elements of government fell away from each other. Society was drawn back to something like its original family groups. Conceptions of government narrowed themselves to small territorial connections. Men became sovereigns in their own right by virtue of owning land in their own right. There was no longer any conception of nations or societies as wholes: union there was none, but only interdependence. Allegiance bowed, not to law or to fatherhood, but to ownership. The functions of government under such a system were simply the functions of proprietorship, of command and obedience: "I say unto one, Go, and he goeth; and to another, Come, and he cometh; and to my servant, Do this, and he doeth it." The public function of the baron was to keep peace among his liegemen, to see that their properties were enjoyed according to the custom of the manor (if the manor had been suffered to acquire custom on any point), and to exact fines of them for all privileges, whether of marrying, of coming of age, or of making a will. The baronial conscience, bred in cruel, hardening times was the only standard of justice; the baronial power the only conclusive test of prerogative.

This was between baron and vassal. Between baron and baron the only bond was a nominal common allegiance to a distant king, who was himself only a great baron. For the rest there was no government, but only diplomacy and warfare. Government lived where it could and as it could, and



was for the most part divided out piecemeal to a thousand petty holders. Feuds were the usual processes of justice.

1243. **The Feudal Monarchy.** — The monarchy which grew out of the ruins of this disintegrate system concentrated authority without much changing its character. The old idea, born of family origins, that government was but the active authority of society, the magistrate but society's organ, bound by society's immemorial laws, had passed utterly away, and government had become the personal possession of one man. The ruler did not any longer belong to the state; the state belonged to him: he was himself the state, as the rich man may be said to be his possessions. The Greek or Roman official was wielded by the community. Not so the king who had swept together into his own lap the powers once broadcast in the feudal system: he wielded the community. Government breathed with his breath, and it was its function to please him. The state had become, by the processes of the feudal development, his private estate.

1244. **Modern De-socialization of the State.** — The reaction from such conceptions, slow and for the most part orderly in England, sudden and violent, because long forcibly delayed, on the Continent, was of course natural, and indeed inevitable. When it came it was radical; but it did not swing the political world back to its old-time ideas; it turned it aside rather to new. It became the object of the revolutionist and the democrat of the new order of things to live his own life: the ancient man had had no thought but to live loyally the life of society. The antique citizen's virtues were not individual in their point of view, but social; whereas our virtues are almost entirely individual in their motive, social only in some of their results.

In brief, the modern State has been largely *de-socialized.* The modern idea is this: the state no longer absorbs the individual; it only serves him: the state, as it appears in its organ, the government, is the representative of the individual,

and not his representative even except within the definite commission of constitutions; while for the rest each man makes his own social relations. 'The individual for the State' has been reversed and made to read, 'The State for the individual.'

1245. **More Changes of Conception than of Practice.** — Such are the divergencies of *conception* separating modern from ancient politics, divergencies at once deep and far-reaching. How far have such changes of thought been accompanied by changes of function? By no means so far as might be expected. Apparently the new ideas given prevalence in politics from time to time have not been able to translate themselves into altered functions but only into somewhat *curtailed* functions, breeding rather a difference of degree than a difference of kind. Even under the most liberal of our modern constitutions we still meet government in every field of social endeavor. Our modern life is so infinitely wide and complex, indeed, that we may go great distances in any field of enterprise without receiving either direct aid or direct check from government; but that is only because every field of enterprise is vastly big nowadays, not because government is not somewhere in it: and we know that the tendency is for governments to make themselves everywhere more and more conspicuously present. We are conscious that we are by no means in the same case with the Greek or Roman: the state is ours, not we the state's. But we know at the same time that the tasks of the state have not been much diminished. Perhaps we may say that the matter stands thus: what is changed is not the activities of government but only the morals, the conscience of government. Government may still be doing substantially the same things as of old; but an altered conception of its responsibility deeply modifies *the way in which it does them.* Social convenience and advancement are still its ultimate standard of conduct, just as if it were still itself the omnipotent impersonation of society, the master of the individual; but it has adopted new ideas as



to what constitutes social convenience and advancement. Its aim is to aid the individual to the fullest and best possible realization of his individuality, instead of merely to the full realization of his *sociality*. Its plan is to create the best and fairest opportunities for the individual; and it has discovered that the way to do this is by no means itself to undertake the administration of the individual by old-time futile methods of guardianship.

1246. **Functions of Government much the Same now as always.** — This is indeed a great and profound change; but it is none the less important to emphasize the fact that the functions of government are still, when catalogued, found to be much the same both in number and magnitude that they always were. Government does not stop with the protection of life, liberty, and property, as some have supposed; it goes on to serve every convenience of society. Its sphere is limited only by its own wisdom, alike where republican and where absolutist principles prevail.

1247. **The State's Relation to Property.** — A very brief examination of the facts suffices to confirm this view. Take, for example, the state's relation to property, its performance of one of the chief of those functions which I have called Constituent. It is in connection with this function that one of the most decided contrasts exists between ancient and modern political practice; and yet we shall not find ourselves embarrassed to recognize as natural the practice of most ancient states touching the right of private property. Their theory was extreme, but, outside of Sparta, their practice was moderate.

1248. **In Sparta.** — Consistent, logical Sparta may serve as the point of departure for our observation: she is the standing classical type of exaggerated state functions and furnishes the most extreme example of the antique conception of the relations of the state to property. In the early periods of her history at least, besides being censor, pedagogue, drill sergeant, and housekeeper to her citizens, she was also universal land-

lord. There was a distinct reminiscence in her practice of the time when the state was the family, and as such the sole owner of property. She was regarded as the original proprietor of all the land in Laconia, and individual tenure was looked upon as rather of the nature of a usufruct held of the state and at the state's pleasure than as resting upon any complete or indefeasible private title.

1249. **Peculiar Situation of the Spartans.** — There were in Sparta special reasons for the persistence of such a system. The Spartans had come into Laconia as conquerors, and the land had first of all been tribal booty. It had been booty of which the Spartan host as a whole, as a State, had had the dividing, and it had been the purpose of the early arrangement to make the division of the land among the Spartan families as equal as possible. Nor did the state resign the right of disposition in making this first distribution. It remained its primary care to keep its citizens, the favored Spartiatæ, upon an equal footing of fortune to the end that they might remain rich in leisure, and so be the better able to live entirely for the service of the state, which was honorable, to the avoidance of that pursuit of wealth which was dishonorable. The state, accordingly, undertook to administer the wealth of the country for the benefit of its citizens. When grave inequalities manifested themselves in the distribution of estates it did not hesitate to resume its proprietary rights and effect a reapportionment: no one dreaming, the while, of calling its action confiscation. It took various means for accomplishing its ends. It compelled rich heiresses to marry men without patrimony; and it grafted the poor citizen upon a good estate by means of prescribed adoption. No landed estate could be alienated either by sale or testament from the family to which the state had assigned it unless express legislative leave were given. In brief, in respect of his property the citizen was both ward and tenant of the state.

1250. **Decay of the System.** — As the Spartan state decayed this whole system was sapped. Estates became grossly unequal, as did also political privileges even among the favored Spartiatæ. But these changes were due to the decadence of Spartan power and to the degeneration of her political fibre in days of waning fortune, not to any conscious or deliberate surrender by the state of her prerogatives as owner, guardian,



and trustee. She had grown old and lax simply; she had not changed her mind.

1251. **In Athens.** — When we turn to Athens we experience a marked change in the political atmosphere, though the Athenians hold much the same abstract conception of the state. Here men breathe more freely and enjoy the fruits of their labor, where labor is without reproach, with less restraint. Even in Athens there remain distinct traces, however, of the family duties of the state. She too, like Sparta, felt bound to dispose properly of eligible heiresses. She did not hesitate to punish with heavy forfeiture of right (*atimia*) those who squandered their property in dissolute living. There was as little limit in Athens as in Sparta to the theoretical prerogatives of the public authority. The freedom of the citizen was a freedom of indulgence rather than of right: he was free because the state refrained, as a privileged child, not as a sovereign under Rousseau's Law of Nature.

1252. **In Rome.** — When we shift our view to republican Rome we do not find a simple city omnipotence like that of Greece, in which all private rights are sunk. The primal constituents of the city yet abide in shapes something like their original. Roman society consists of a series of interdependent links: the family, the gens, the city. The aggregate, not the fusion, of these makes up what we should call the state. But the state, so made up, was omnipotent, through one or other of its organs, over the individual. Property was not private in the sense of being individual; it vested in the family, which was, in this as in other respects, an organ of the state. Property was not conceived of as state property, because it had remained the undivided property of the family. The father, as a ruler in the immemorial hierarchy of the government, was all-powerful trustee of the family estates. Individual ownership there was none.

1253. **Under Modern Governments.** — We with some justice felicitate ourselves that to this omnipotence of the ancient

state in its relations to property the practice of our own governments offers the most pronounced contrasts. But the point of greatest interest for us in the present connection is this, that these contrasts are contrasts of *policy, not of power*. To what lengths it will go in regulating property rights is for each government a question of principle, which it must put to its own conscience, and if it be wise, it will debate in the light of political expediency. That every government must regulate property in one way or other. If the ancient state was regarded as the ultimate heir, the modern state is regarded as the ultimate heir of deceased states. Failing other claimants, property *escheats* to the state. If the modern state does not assume, like the ancient, to administer their property upon occasion for competent adults, it does administer their property upon occasion for lunatics and minors. The ancient state controlled slaves and slavery; the modern state has been quite as absolute: it has abolished slaves and slavery. The modern state, no less than the ancient, sets rules and limitations to inheritance and bequest. Most of the more extreme and hurtful interferences with rights of private ownership government has abandoned, one may suspect, rather because of difficulties of administration than because of difficulties of conscience. It is of the nature of the state to regulate property rights; it is of the policy of the state to regulate them *more* or *less*. Administrators must regard this as one of the Constituent functions of political society.

1254. **The State and Political Rights.** — Similar conclusions may be drawn from a consideration of the contrasts which exist in the field of that other Constituent function which concerns the determination of political rights, — the contrasts between the *status* of the citizen in the ancient state and the *status* of the citizen in the modern state. Here also the contrast, as between state and state, is not one of power, but one of principle and habit rather. Modern states have often limited as narrowly as did the ancient the enjoyment of those political



privileges which we group under the word *Franchise*. They too, as well as the ancient states, have admitted slavery into their systems; they too have commanded their subjects without moderation and fleeced them without compunction. But for all they have been so omnipotent, and when they chose so tyrannical, they have seldom insisted upon so complete and unreserved a service of the state by the citizen as was habitual to the political practice of both the Greek and the Roman worlds. The Greek and the Roman belonged each to his state in a quite absolute sense. He was his own in nothing as against the claims of his city upon him: he freely acknowledged all his privileges to be but concessions from his mother, the commonwealth. Those privileges accrued to him through law, as do ours; but law was to him simply the will of the organic community, never, as we know it in our constitutions, a restraint upon the will of the organic community. He knew no principles of liberty save only those which custom had built up: which inhered, not in the nature of things, not in abstract individuality, but in the history of affairs, in concrete practice. His principles were all precedents. Nevertheless, however radically different its doctrines, the ancient state was not a whit more completely master touching laws of citizenship than is the state of to-day.

1255. **As regards the State's Ministrant Functions.** — Of the Ministrant, no less than of these Constituent functions which I have taken merely as examples of their kind, the same statement may be made, that practically the state has been relieved of very little duty by alterations of political theory. In this field of the Ministrant functions one would expect the state to be less active now than formerly: it is natural enough that in the field of the Constituent functions the state should serve society now as always. But there is in fact no such difference: *government does now whatever experience permits or the times demand;* and though it does not do exactly the same things it still does substantially the same kind of things that

the ancient state did. It will conduce to clearness if I set forth my illustrations of this in the order of the list of Ministrant functions which I have given (sec. 1234).

1256. **The State in Relation to Trade.** — (1) All nations have habitually regulated trade and commerce. In the most remote periods of which history has retained any recollection the regulation of trade and commerce was necessary to the existence of government. The only way in which communities which were then seeking to build up a dominant power could preserve an independent existence and work out an individual development was to draw apart to an absolutely separate life. Commerce meant contact; contact meant contamination: the only way in which to develop character and achieve cohesion was to avoid intercourse. In the classical states this stage is of course passed and trade and commerce are regulated for much the same reasons that induce modern states to regulate them, in order, that is, to secure commercial advantage as against competitors or in order to serve the fiscal needs of the state. Athens and Sparta and Rome, too, regulated the corn trade for the purpose of securing for their citizens full store of food. In the Middle Ages the feuds and highway brigandage of petty lords loaded commerce with fetters of the most harassing sort, except where the free cities could by militant combination keep open to it an unhindered passage to and fro between the great marts of North and South. As the mediæval states emerge into modern times we find trade and commerce handled by statesmen as freely as ever, but according to the reasoned policy of the mercantilist thinkers; and in our own days according to still other conceptions of national advantage.

1257. **The State in Relation to Labor.** — (2) Labor, too, has always been regulated by the state. By Greek and Roman the labor of the handicrafts and of agriculture, all manual toil indeed, was for the most part given to slaves to do; and of course law regulated the slave. In the Middle Ages the



labor which was not agricultural and held in bondage to feudal masters was in the cities, where it was rigidly ordered by the complex rules of the guild system, as was trade also and almost all other like forms of making a livelihood. Where, as in England, labor in part escaped from the hard service of the feudal tenure the state stepped in with its persistent "statutes of laborers" and sought to tie the workman to one habitation and to one rate of wages. 'The rustic must stay where he is and must receive only so much pay,' was its command. Apparently, however, all past regulation of labor was but timid and elementary as compared with the labor legislation about to be tried by the governments of our own day. The birth and development of the modern industrial system has changed every aspect of the matter; and this fact it is which reveals the true character of the part which the state plays in the case. The rule would seem to be that in proportion as the world's industries grow must the state advance in its efforts to assist the industrious to advantageous relations with each other. The tendency to regulate labor rigorously and minutely is as strong in England, where the state is considered the agent of the citizen, as it was in Athens, where the citizen was deemed the child and tool of the state, and where the workman was a slave.

1258. (3) **Regulation of Corporations.** — The regulation of corporations is but one side of the modern regulation of the industrial system, and is a function added to the antique list of governmental tasks.

1259. (4) **The State and Public Works.** — The maintenance of thoroughfares may be said to have begun with permanent empire, that is to say, for Europe, with the Romans. For the Romans, indeed, it was first a matter of moving armies, only secondarily a means of serving commerce; whereas with us the highway is above all things else an artery of trade, and armies use it only when commerce stands still at the sound of drum and trumpet. The building of roads may therefore be

said to have begun by being a Constituent function and to have ended by becoming a Ministrant function of government. But the same is not true of other public works, of the Roman aqueducts and theatres and baths, and of modern internal improvements. They, as much as the Roman tax on old bachelors, are parts, not of a scheme of governing, but of plans for the advancement of other social aims, — for the administration of society. Because in her conception the community as a whole was the only individual, Rome thrust out as of course her magnificent roads to every quarter of her vast territory, considered no distances too great to be traversed by her towering aqueducts, deemed it her duty to clear river courses and facilitate by every means both her commerce and her arms. And the modern state, though holding a deeply modified conception of the relations of government to society, still follows no very different practice. If in most instances our great iron highways are left to private management, it is oftener for reasons of convenience than for reasons of conscience.

1260. (5) **Administration of the Conveniences of Society.** — Similar considerations of course apply in the case of that modern instrumentality, the public letter-post, in the case of the still more modern manufacture of gas, and in the case of the most modern telegraph. The modern no less than the ancient government unhesitatingly takes a hand in administering the conveniences of society.

1261. (6) **Sanitation.** — Modern governments, like the government of Rome, maintain sanitation by means of police inspection of baths, taverns, and houses of ill fame, as well as by drainage; and to these they add hospital relief, water supply, quarantine, and a score of other means.

1262. (7) **Public Education.** — Our modern systems of public education are more thorough than the ancient, notwithstanding the fact that we regard the individual as something other than a mere servant of the state, and educate him first of all for himself.



1263. (8) **Sumptuary Laws.** — In sumptuary laws ancient states of course far outran modern practice. Modern states have of course foregone most attempts to make citizens virtuous or frugal by law. But even we have our prohibition enactments; and we have had our fines for swearing.

1264. **Summary.** — Apparently it is safe to say with regard to the functions of government taken as a whole that, even as between ancient and modern states, uniformities of practice far outnumber diversities of practice. One may justly conclude, not indeed that the restraints which modern states put upon themselves are of little consequence, or that altered political conceptions are not of the greatest moment in determining important questions of government and even the whole advance of the race; but that it is rather by gaining practical wisdom, rather by long processes of historical experience, that states modify their practices; new theories are subsequent to new experiences

XVI.

THE OBJECTS OF GOVERNMENT.

1265. **Character of the Subject.** — Political interest and controversy centre nowhere more acutely than in the question, What are the proper objects of government? This is one of those difficult questions upon which it is possible for many sharply opposed views to be held apparently with almost equal weight of reason. Its central difficulty is this, that it is a question which can be answered, if answered at all, only by the aid of a broad and careful wisdom whose conclusions are based upon the widest possible inductions from the facts of political experience in all its phases. Such wisdom is of course quite beyond the capacity of most thinkers and actors in the field of politics; and the consequence has been that this question, perhaps more than any other in the whole scope of political science, has provoked great wars of doctrine.

1266. **The Extreme Views Held.** — What part shall government play in the affairs of society? — that is the question which has been the gauge of controversial battle. Stated in another way, it is the very question which I postponed when discussing the functions of government (sec. 1231), '*What*,' namely, '*ought the functions of government to be?*' On the one hand there are extremists who cry constantly to government, 'Hands off,' '*laissez faire*,' '*laissez passer*'! who look upon every act of government which is not merely an act of police with jealousy, who regard government as necessary, but as a necessary evil, and who would have government hold back from every-



thing which could by any possibility be accomplished by individual initiative and endeavor. On the other hand, there are those who, with equal extremeness of view in the opposite direction, would have society lean fondly upon government for guidance and assistance in every affair of life, who, captivated by some glimpse of public power and beneficence caught in the pages of ancient or mediæval historian or by some dream of co-operative endeavor cunningly imagined by the great fathers of Socialism, believe that the state can be made a wise foster-mother to every member of the family politic. Between these two extremes, again, there are all grades, all shades and colors, all degrees of enmity or of partiality to state action.

1267. **Historical Foundation for Opposite Views.** — Enmity to exaggerated state action, even a keen desire to keep that action down to its lowest possible terms, is easily furnished with impressive justification. It must unreservedly be admitted that history abounds with warnings of no uncertain sound against indulging the state with a too great liberty of interference with the life and work of its citizens. Much as there is that is attractive in the political life of the city states of Greece and Rome, in which the public power was suffered to be omnipotent, — their splendid public spirit, their incomparable organic wholeness, their fine play of rival talents, serving both the common thought and the common action, their variety, their conception of public virtue, there is also much to blame, — their too wanton invasion of that privacy of the individual life in which alone family virtue can dwell secure, their callous tyranny over minorities in matters which might have been left to individual choice, their sacrifice of personal independence for the sake of public solidarity, their hasty average judgments, their too confident trust in the public voice. They, it is true, could not have had the individual liberty which we cherish without breaking violently with their own history, with the necessary order of their development; but neither can we, on the other hand, imitate them without an equally violent

departure from our own normal development and a reversion to the now too primitive methods of their pocket republics.

1268. Unquestionable as it is, too, that mediæval history affords many seductive examples of an absence of grinding, heartless competition and a strength of mutual interdependence, confidence, and helpfulness between class and class such as the modern economist may be pardoned for wishing to see revived; and true though it be that the history of Prussia under some of the greater Hohenzollern gives at least colorable justification to the opinion that state interference may under many circumstances be full of benefit for the industrial upbuilding of a state, it must, on the other hand, be remembered that neither the feudal system, nor the mediæval guild system, nor the paternalism of Frederic the Great can be rehabilitated now that the nineteenth century has wrought its revolutions in industry, in church, and in state; and that, even if these great systems of the past could be revived, we would be sorely puzzled to reinstate their blessings without restoring at the same time their acknowledged evils. No student of history can wisely censure those who protest against state paternalism.

1269. **The State a Beneficent and Indispensable Organ of Society.** — It by no means follows, however, that because the state may unwisely interfere in the life of the individual, it must be pronounced in itself and by nature a necessary evil. It is no more an evil than is society itself. It is the organic body of society: without it society would be hardly more than a mere abstraction. If the name had not been restricted to a single, narrow, extreme, and radically mistaken class of thinkers, we ought all to regard ourselves and to act as *socialists*, believers in the wholesomeness and beneficence of the body politic. If the history of society proves anything, it proves the absolute naturalness of government, its rootage in the nature of man, its origin in kinship, and its identification with all that makes man superior to the brute creation. Individually man is but poorly equipped to dominate other animals: his lordship comes

by combination, his strength is concerted strength, his sovereignty is the sovereignty of union. Outside of society man's mind can avail him little as an instrument of supremacy, and government is the visible form of society: if society itself be not an evil, neither surely is government an evil, for government is the indispensable organ of society.

1270. Every means, therefore, by which society may be perfected through the instrumentality of government, every means by which individual rights can be fitly adjusted and harmonized with public duties, by which individual self-development may be made at once to serve and to supplement social development, ought certainly to be diligently sought, and, when found, sedulously fostered by every friend of society. Such is the socialism to which every true lover of his kind ought to adhere with the full grip of every noble affection that is in him.

1271. **Socialism and the Modern Industrial Organization.** — It is possible indeed, to understand, and even in a measure to sympathize with, the enthusiasm of those special classes of agitators whom we have dubbed with the too great name of 'Socialists.' The schemes of social reform and regeneration which they support with so much ardor, however mistaken they may be, — and surely most of them are mistaken enough to provoke the laughter of children, — have the right end in view: they seek to bring the individual with his special interests, personal to himself, into complete harmony with society with its general interests, common to all. Their method is always some sort of co-operation, meant to perfect mutual helpfulness. They speak, too, a revolt from selfish, misguided individualism; and certainly modern individualism has much about it that is hateful, too hateful to last. The modern industrial organization has so distorted competition as to put it into the power of some to tyrannize over many, as to enable the rich and the strong to combine against the poor and the weak. It has given a woeful material meaning to that spiritual law that "to him that hath shall be given, and from him that hath not

shall be taken away even the little that he seemeth to have."[1] It has magnified that self-interest which is grasping selfishness and has thrust out love and compassion not only, but free competition in part, as well. Surely it would be better, exclaims the Socialist, altogether to stamp out competition by making all men equally subject to the public order, to an imperative law of social co-operation! But the Socialist mistakes: it is not competition that kills, but unfair competition, the pretence and form of it where the substance and reality of it cannot exist.

1272. **A Middle Ground.** — But there is a middle ground. The schemes which Socialists have proposed society assuredly cannot accept, and no scheme which involves the complete control of the individual by government can be devised which differs from theirs very much for the better. A truer doctrine must be found, which gives wide freedom to the individual for his self-development and yet guards that freedom against the competition that kills, and reduces the antagonism between self-development and social development to a minimum. And such a doctrine can be formulated, surely, without too great vagueness.

1273. **The Objects of Society the Objects of Government.** — Government, as I have said, is the organ of society, its only potent and universal instrument: its objects must be the objects of society. What, then, are the objects of society? What *is* society? It is an organic association of individuals for mutual aid. Mutual aid to what? To self-development. The hope of society lies in an infinite individual variety, in the freest possible play of individual forces: only in that can it find that wealth of resource which constitutes civilization, with all its appliances for satisfying human wants and mitigating human sufferings, all its incitements to thought and spurs to action. It should be the end of government *to accomplish the objects of organized society:* there must be constant adjust-

[1] F. A. Walker's *Political Economy* (Advanced Course), sec. 346.



ments of governmental assistance to the needs of a changing social and industrial organization. Not license of interference on the part of government, only strength and adaptation of regulation. The regulation that I mean is not interference: it is the equalization of conditions, so far as possible, in all branches of endeavor; and the equalization of conditions is the very opposite of interference.

1274. Every rule of development is a rule of adaptation, a rule for meeting 'the circumstances of the case'; but the circumstances of the case, it must be remembered, are not, so far as government is concerned, the circumstances of any individual case, but the circumstances of society's case, the general conditions of social organization. The case for society stands thus: the individual must be assured the best means, the best and fullest opportunities, for complete self-development: in no other way can society itself gain variety and strength. But one of the most indispensable conditions of opportunity for self-development government alone, society's controlling organ, can supply. 'All combination which necessarily creates monopoly, which necessarily puts and keeps indispensable means of industrial or social development in the hands of a few, and those few, not the few selected by society itself but the few selected by arbitrary fortune, must be under either the direct or the indirect control of society.' To society alone can the power of dominating combination belong: and society cannot suffer any of its members to enjoy such a power for their own private gain independently of its own strict regulation or oversight.

1275. **Natural Monopolies.** — It is quite possible to distinguish natural monopolies from other classes of undertakings; their distinctive marks are thus enumerated by Mr. T. H. Farrer in his excellent little volume on *The State in its relation to Trade* which forms one of the well-known English Citizen series: [1]

[1] P. 71. Mr. Farrer is Permanent Secretary of the English Board of Trade (sec. 694).

"1. What they supply is a necessary," a necessary, that is, to life, like water, or a necessary to industrial action, like railroad transportation.

"2. They occupy peculiarly favored spots or lines of land." Here again the best illustration is afforded by railroads or by telegraph lines, by water-works, etc.

"3. The article or convenience they supply is used at the place and in connection with the plant or machinery by which it is supplied;" that is to say, at the favored spots or along the favored lines of land.

"4. This article or convenience can in general be largely, if not indefinitely increased, without proportionate increase in plant and capital;" that is to say, the initial outlay having been made, the favored spot or line of land having been occupied, every subsequent increase of business will increase profits because it will not proportionately, or anything like proportionately, increase the outlay for services or machinery needed. Those who are outside of the established business, therefore, are upon an equality of competition neither as regards available spots or lines of land nor as regards opportunities to secure business in a competition of rates.

"5. Certain and harmonious arrangement, which can only be attained by unity, are paramount considerations." Wide and systematic organization is necessary.

1276. Such enterprises invariably give to a limited number of persons the opportunity to command certain necessaries of life, of comfort, or of industrial success against their fellow countrymen and for their own advantage. Once established in any field, there can be no real competition between them and those who would afterwards enter that field. No agency should be suffered to have such control except a public agency which may be compelled by public opinion to act without selfish narrowness, upon perfectly equal conditions as towards all, or some agency upon which the government may keep a strong hold of regulation.

1277. **Control not necessarily Administration.** — Society can by no means afford to allow the use for private gain and



without regulation of undertakings necessary to its own healthful and efficient operation and yet of a sort to exclude equality in competition. Experience has proved that the self-interest of those who have controlled such undertakings for private gain is not coincident with the public interest: even enlightened self-interest may often discover means of illicit pecuniary advantage in unjust discriminations between individuals in the use of such instrumentalities. But the proposition that the government should control such dominating organizations of capital may by no means be wrested to mean by any necessary implication that the government should itself administer those instrumentalities of economic action which cannot be used except as monopolies. In such cases, as Mr. Farrer says, "there are two great alternatives. (1) Ownership and management by private enterprise and capital under regulation by the state. (2) Ownership and management by Government, central or local." Government regulation may in most cases suffice. Indeed, such are the difficulties in the way of establishing and maintaining careful business management on the part of government, that control ought to be preferred to direct administration in as many cases as possible, — in every case in which control without administration can be made effectual.

1278. **Equalization of Competition.** — There are some things outside the field of natural monopolies in which individual action cannot secure equalization of the conditions of competition; and in these also, as in the regulation of monopolies, the practice of governments, of our own as well as of others, has been decisively on the side of governmental regulation. By forbidding child labor, by supervising the sanitary conditions of factories, by limiting the employment of women in occupations hurtful to their health, by instituting official tests of the purity or the quality of goods sold, by limiting hours of labor in certain trades, by a hundred and one limitations of the power of unscrupulous or heartless men to out-do the scrupulous and merciful in trade or industry, government has assisted equity. Those

who would act in moderation and good conscience in cases where moderation and good conscience, to be indulged, require an increased outlay of money, in better ventilated buildings, in greater care as to the quality of goods, etc., cannot act upon their principles so long as [illegible] finding conditions for labor or more unscrupulous us[illegible] portunities of trade secure to the unconscientious a[illegible] onable and sometimes even a permanent advantage; [illegible] only the choice of denying their consciences or ret[illegible] usiness. In scores of such cases government has [illegible] and will intervene; but by way, not of interference, [illegible]her, of making competition equal between those who [illegible] ghtfully conduct enterprise and those who basely conduct it. It is in this way that society protects itself against permanent injury and deterioration, and secures healthful equality of opportunity for self-development.

1279. **Society greater than Government.** — Society, it must always be remembered, is vastly bigger and more important than its instrument, Government. Government should serve Society, by no means rule or dominate it. Government should not be made an end in itself; it is a means only, — a means to be freely adapted to advance the best interests of the social organism. The State exists for the sake of Society, not Society for the sake of the State.

1280. **Natural Limits to State Action.** — And that there are natural and imperative limits to state action no one who seriously studies the structure of society can doubt. The limit of state functions is the limit of *necessary co-operation* on the part of Society as a whole, the limit beyond which such combination ceases to be imperative for the public good and becomes merely convenient for industrial or social enterprise. Co-operation is necessary in the sense here intended when it is indispensable to the equalization of the conditions of endeavor, indispensable to the maintenance of uniform rules of individual rights and relationships, indispensable because to



omit it would inevitably be to hamper or degrade some for the advancement of others in the scale of wealth and social standing.

1281. There are relations in which men invariably have need of each other, in which universal co-operation is the indispensable condition of even tolerable existence. Only some universal authority can make opportunities equal as between man and man. The divisions of labor and the combinations of commerce may for the most part be left to contract, to free individual arrangement, but the equalization of the conditions which affect all alike may no more be left to individual initiative than may the organization of government itself. Churches, clubs, corporations, fraternities, guilds, partnerships, unions have for their ends one or another special enterprise for the development of man's spiritual or material well-being: they are all more or less advisable. But the family and the state have as their end a general enterprise for the betterment and equalization of the conditions of individual development: they are indispensable.

1282. The point at which public combination ceases to be imperative is of course not susceptible of clear indication in general terms; but it is not on that account indistinct. The bounds of family association are not indistinct because they are marked only by the immaturity of the young and by the parental and filial affections, — things not all of which are defined in the law. The rule that the state should do nothing which is equally possible under equitable conditions to optional associations is a sufficiently clear line of distinction between governments and corporations. Those who regard the state as an optional, conventional union simply, a mere partnership, open wide the doors to the worst forms of socialism. Unless the state has a nature which is quite clearly defined by that invariable, universal, immutable mutual interdependence which runs beyond the family relations and cannot be satisfied by family ties, we have absolutely no criterion by which we can

limit, except arbitrarily, the activities of the state. The criterion supplied by the native necessity of state relations, on the other hand, banishes such license of state action.

1283. The state for instance ought not to supervise private morals because they belo parate individual responsibility, not to the sphere of mutr e. Thought and conscience are private. Opinion is opt tate may intervene only where common action, uniform spensable. Whatever is merely convenient is optional, not an affair for the state. Churches are spiritually c joint-stock companies are capitalistically convenient; b state constitutes itself a church or a mere business assoc tutes a monopoly no better than others. It should do nothing w not in any case both indispensable to social or industrial life and necessarily monopolistic.

1284. **The Family and the State.** — It is the proper object of the family to mould the individual, to form him in the period of immaturity in the practice of morality and obedience. This period of subordination over, he is called out into an independent, self-directive activity. The ties of family affection still bind him, but they bind him with silken, not with iron bonds. He has left his 'minority' and reached his 'majority.' It is the proper object of the state to give leave to his individuality, in order that that individuality may add its quota of variety to the sum of national activity. Family discipline is variable, selective, formative: it must lead the individual. But the state must not lead. It must create conditions, but not mould individuals. Its discipline must be invariable, uniform, impersonal. Family methods rest upon individual inequality, state methods upon individual equality. Family order rests upon tutelage, state order upon franchise, upon privilege.

1285. **The State and Education.** — In one field the state would seem at first sight to usurp the family function, the field, namely, of education. But such is not in reality the case. Education is the proper office of the state for two rea-



sons, both of which come within the principles we have been discussing. Popular education is necessary for the preservation of those conditions of freedom, political and social, which are indispensable to free individual development. And, in the second place, no instrumentality less universal in its power and authority than government can secure popular education. In brief, in order to secure popular education the action of society as a whole is necessary; and popular education is indispensable to that equalization of the conditions of personal development which we have taken to be the proper object of society. Without popular education, moreover, no government that rests upon popular action can long endure: the people must be schooled in the knowledge, and if possible in the virtues, upon which the maintenance and success of free institutions depend. No free government can last in health if it lose hold of the traditions of its history, and in the public schools these traditions may be and should be sedulously preserved, carefully replanted in the thought and consciousness of each successive generation.

1286. **Historical Conditions of Governmental Action.** — Whatever view be taken in each particular case of the rightfulness or advisability of state regulation and control, one rule there is which may not be departed from under any circumstances, and that is the rule of historical continuity. In politics nothing radically novel may safely be attempted. No result of value can ever be reached in politics except through slow and gradual development, the careful adaptations and nice modifications of growth. Nothing may be done by leaps. More than that, each people, each nation, must live upon the lines of its own experience. Nations are no more capable of borrowing experience than individuals are. The histories of other peoples may furnish us with light, but they cannot furnish us with conditions of action. Every nation must constantly keep in touch with its past: it cannot run towards its ends around sharp corners.

1287. **Summary.** — This, then, is the sum of the whole matter: the end of government is the facilitation of the objects of society. The rule of governmental action is necessary co-operation; the method of political development is conservative adaptation, shaping old habits into new ones, modifying old means to accomplish ne

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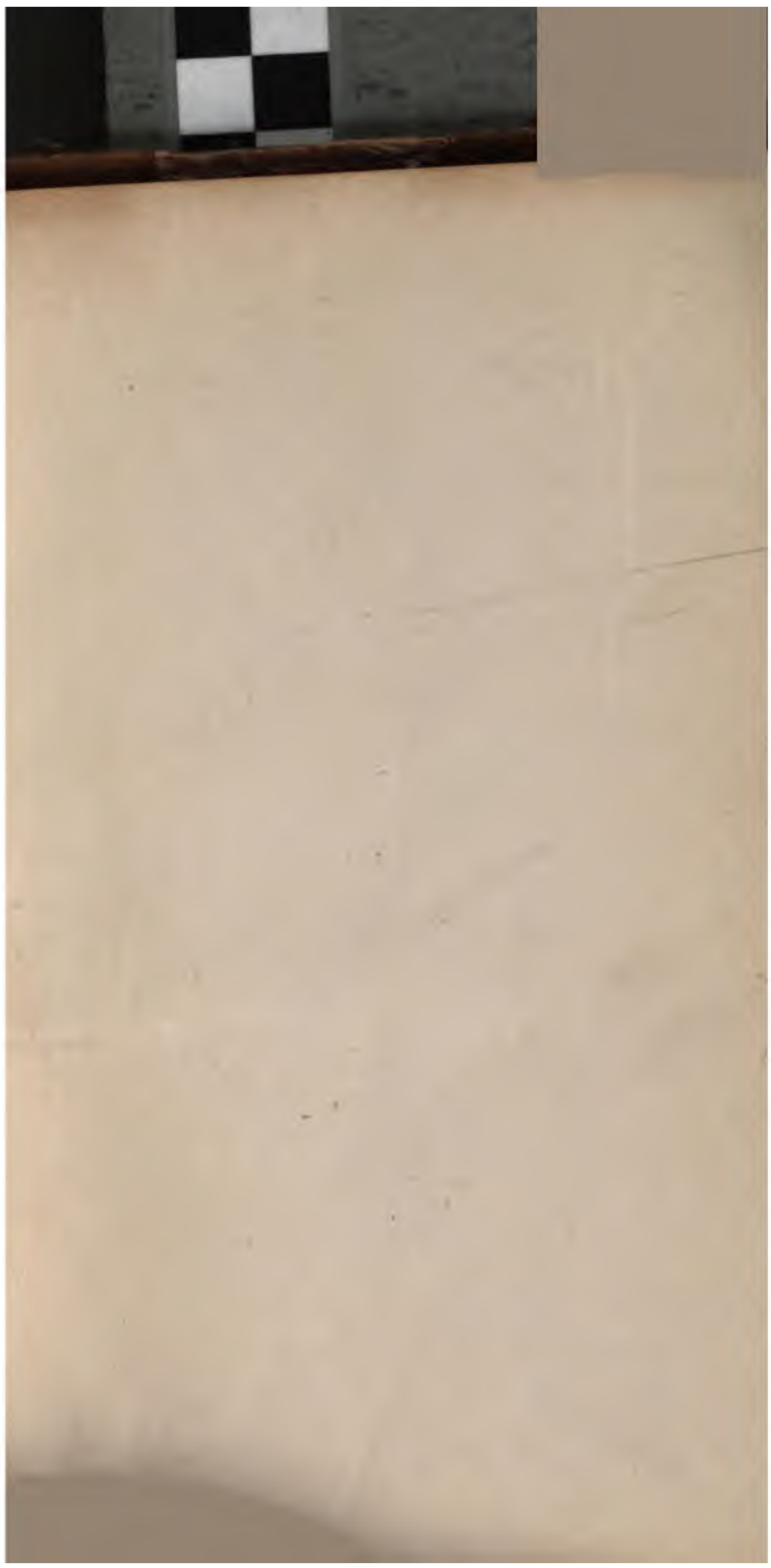
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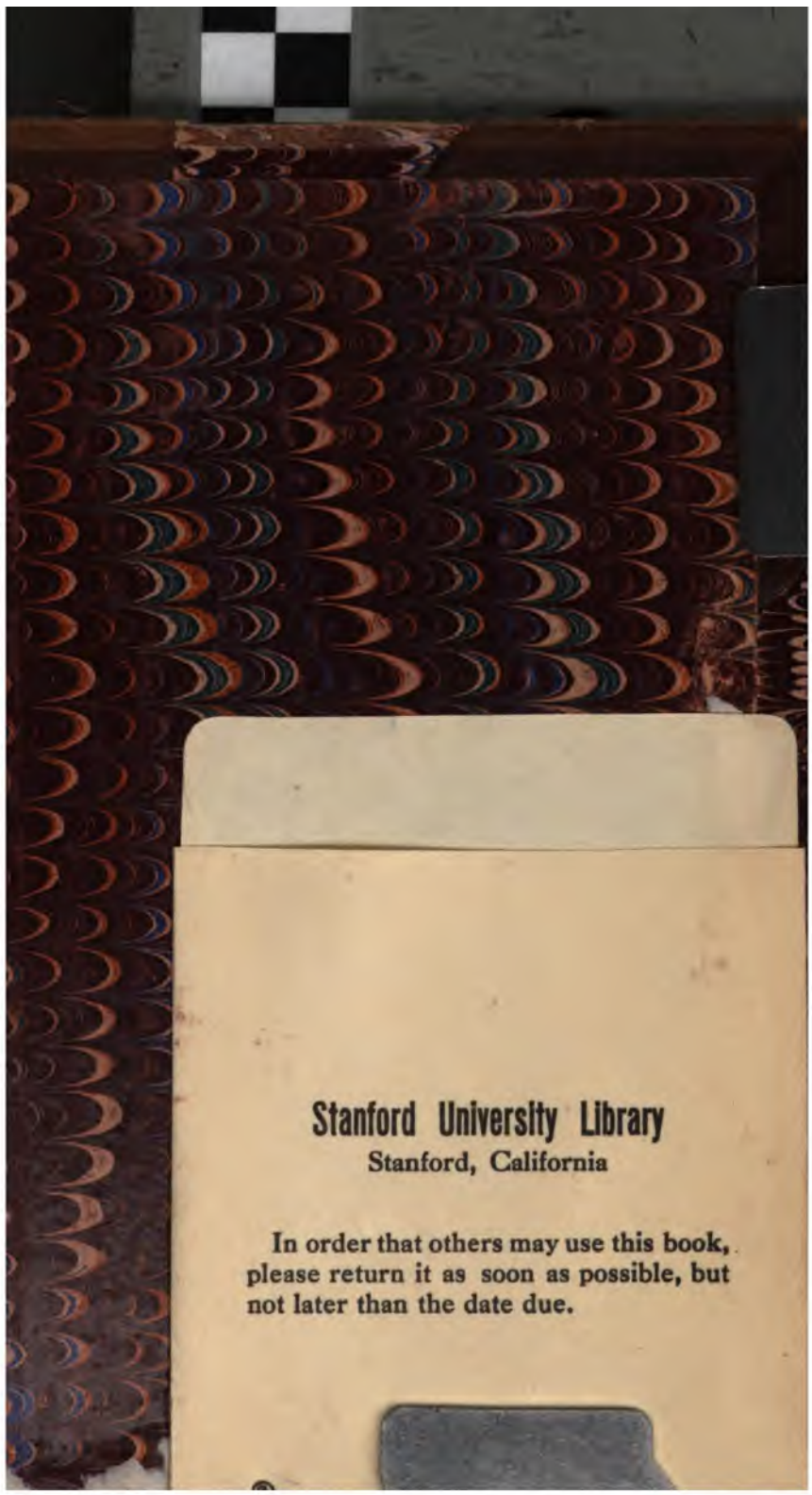
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